CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 24

MARINE HARBOR PROPERTIES, INC.,
PETITIONER,

vs.

MANUFACTURER'S TRUST COMPANY (SUCCESSOR BY MERGER TO THE MORTGAGE CORPORATION OF NEW YORK), AS TRUSTEE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1942.

CERTIORARI GRANTED MARCH 16, 1942.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

1

IN THE MATTER
of
MARINE HARBOR PROPERTIES, INC.,
Debtor-Appellee,

MANUFACTURERS TRUST COMPANY (successor by merger to The Mortgage Corporation of New York), as Trustee for the benefit of certificate holders in mortgage guaranteed by Bond and Mortgage Guarantee Company, Guarantee No. 181,568,
Petitioner-Appellant,

MAURICE RUBINGER, Trustee of Marine Harbor Properties, Inc., SAMUEL SILVERMAN, additional Trustee of Marine Harbor Properties, Inc., and MORTIMER RUBENSTEIN, Foreclosure Receiver, 2
Appellees.

Statement Under Rule XIII

The name of the court and the title of the case is as follows: United States District Court, Southern District of New York. In the Matter of MARINE HARBOR PROPERTIES, INC., Debtor, in a proceeding for the reorganization of a corporation No. 79,473.

Marine Harbor Properties, Inc., filed its petition for reorganization, pursuant to Chapter X of the Chandler Act, on the 17th day of September, 1941, praying "that the court 3
find that the petition complies with and is properly filed under Chapter X of the Bankruptcy Act; that the debtor is unable to meet its debts as they mature; that said petition has been filed in good faith", etc. Thereafter, an order was signed by Hon. John Bright, *D.J.*, on September 17, 1941, approving the debtor's said petition. Neither the presentation of the petition nor the presentation or entry of the order of September 17, 1941, was on notice to The Mortgage Corporation of New York.

An order to show cause was obtained by The Mortgage Corporation of New York, as Trustee, on September 27, 1941, for an order vacating the order of September 17, 1941 which had approved the debtor's petition and appointed Trustees

of the debtor's estate, and dismissing said petition. A hearing was held before Hon. John Bright, *D.J.*, upon said order to show cause, and the application was denied in all respects with an opinion and an order was entered thereon by Hon. John Bright, *D.J.*, dated October 3, 1941.

The Mortgage Corporation of New York was merged into the Manufacturers Trust Company pursuant to agreement of merger under Section 441 of the New York Insurance Law, as of September 30, 1941.

The notice of appeal was duly filed with the clerk of the court on the 3rd day of October, 1941. The undertaking on
5 appeal was duly filed with the clerk of the court on the 3rd day of October, 1941.

FRIEDLAND & FRIEDLAND, Esqs., are the attorneys for the debtor-appellee and they have their offices at 291 Broadway, in the Borough of Manhattan, City and State of New York.

HUGHES, HUBBARD & EWING, Esqs., are the attorneys for the appellant MANUFACTURERS TRUST COMPANY, formerly The Mortgage Corporation of New York, as Trustee for the benefit of the holders of certificates in the first mortgage covering the premises owned by the debtor, and they have their offices at 1 Wall Street, in the Borough of Manhattan, City and State of New York.

6 MAURICE RUBINGER, Esq., is one of the Trustees under the order of the District Court and has his office at 160 Broadway, in the Borough of Manhattan, City and State of New York.

SAMUEL SILVERMAN, Esq., is one of the Trustees under the order of the District Court and has his office at 50 Broad Street, in the Borough of Manhattan, City and State of New York.

GEORGE ROSLING, Esq., is attorney for MORTIMER RUBENSTEIN, as Receiver, in the New York State Supreme Court, and has his office at 50 Court Street, in the Borough of Brooklyn, City and State of New York.

Notice has been given to the SECURITIES AND EXCHANGE COMMISSION which has its office at 120 Broadway, in the Borough of Manhattan, City and State of New York.

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

of

MARINE HARBOR PROPERTIES, INC.,

Debtor.

SIRS:

NOTICE IS HEREBY GIVEN that Manufacturers Trust Company, formerly The Mortgage Corporation of New York, as Trustee, Petitioner herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order of this Court dated October 3, 1941, made by Hon. John Bright, District Judge, wherein the petition of The Mortgage Corporation of New York, as Trustee, was, in all respects, denied and from each and every part thereof.

Dated, New York, N. Y.
October 3, 1941.

Yours, etc.

HUGHES, HUBBARD & EWING
Attorneys for Manufacturers Trust Company, formerly The Mortgage Corporation of New York
One Wall Street
New York, New York

10 *Order Appealed From*

To:

FRIEDLAND & FRIEDLAND
Attorneys for Debtor
291 Broadway
New York, New York

MAURICE RUBINGER, Esq.,
Trustee
160 Broadway
New York, New York

SAMUEL SILVERMAN, Esq.,
11 Trustee
50 Broad Street
New York, New York

SECURITIES & EXCHANGE COMMISSION
120 Broadway
New York, New York

GEORGE ROSLING, Esq.,
Attorney for Mortimer Rubinstein, as Receiver
50 Court Street
Brooklyn, New York

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12 **Order Appealed From**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

An application having been made by The Mortgage Corporation of New York as Trustee of a certain mortgage covering real property of the above-named debtor, for an order dismissing debtor's petition herein verified September

15, 1941 and vacating the order of this Court herein dated September 17, 1941,

Now, on reading and filing the order to show cause of this Court dated September 27, 1941, the petition of The Mortgage Corporation of New York as Trustee verified September 27, 1941, with the exhibits thereto annexed, the affidavit of Curtiss Ely Frank sworn to September 29, 1941, the affidavit of Joseph L. Long sworn to September 29, 1941, and the order of this Court dated September 24, 1941, in support of the motion and the affidavit of Gussie Hammer sworn to September 29, 1941, and affidavit of Samuel Silverman in opposition thereto, and said application having duly come on to be heard on September 29, 1941, and after hearing Hughes, Hubbard & Ewing (Curtiss Ely Frank, Esq., of counsel), attorneys for The Mortgage Corporation of New York as Trustee, in support of said application, and Friedland & Friedland (Arthur S. Friedland, Esq., of counsel), attorneys for the debtor, in opposition, and Samuel Silverman, Esq., and Maurice Rubinger, Esq., trustees of the debtor, appearing and not opposing, and George Rosling, Esq., attorney for Mortimer Rubenstein as receiver, appearing but not opposing; and due deliberation having been had thereon, and upon reading and filing the opinion of the Court, it is

ORDERED that the application of The Mortgage Corporation of New York as Trustee be and the same hereby is in all respects denied; and further

ORDERED that the turning over to the trustees in bankruptcy by Mortimer Rubenstein of such moneys as he has in his possession as receiver in the New York State Supreme Court foreclosure action of the debtor's mortgage and his subsequent accounting shall be without prejudice to his application for receivership commissions and attorney's fees.

Dated: October 3rd, 1941.

JOHN BRIGHT,
U. S. D. J.

Order to Show Cause of Hon. John Bright dated September 27, 1941

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

On the annexed petition of The Mortgage Corporation of New York, as trustee under a declaration of trust dated December 12, 1938, for the holders of investments in certain premises covering 351-363 Marine Avenue, Borough of Brooklyn, County of Kings, City and State of New York, verified on September 26, 1941, and the Exhibits annexed thereto, and upon all proceedings had herein.

Let the debtor show cause before one of the judges of the United States District Court for the Southern District of New York on the 1st day of October, 1941, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard in Room 506 in the United States Court House, Foley Square, City of New York, why an order should not be made and entered herein vacating the order of this Court herein dated September 17, 1941, dismissing the debtor's petition, verified September 15, 1941 and for such other and further relief as to the court may seem just and equitable, and it is

ORDERED that service of this order is to be executed on or before 12 P. M. of September 29, 1941, by delivering to and leaving a copy of the same with Messrs. Freidland & Freidland, attorneys for the debtor, 291 Broadway, Borough of Manhattan, City of New York, Maurice Rubinger, Esq., trustee, 160 Broadway, Borough of Manhattan, City of New York, Samuel Silverman, Esq., additional trustee, 50 Broad Street, Borough of Manhattan, City of New York and George Rosling, Esq., 50 Court Street, Borough of Brooklyn, City of New York, attorney for Mortimer Rubenstein as Receiver, and it is further

Dated, September 27, 1941.

JOHN BRIGHT
U. S. D. J.

19

Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

20

To: The Honorable Judges of the United States District Court, Southern District of New York.

The petition of The Mortgage Corporation of New York as Trustee respectfully shows to the Court as follows:

1. The Mortgage Corporation of New York, a domestic corporation duly organized and existing under the Insurance Law of the State of New York, is trustee under a declaration of trust dated December 12, 1938, for the benefit of the holders of mortgage investments therein, of a certain mortgage covering premises 351-363 Marine Avenue, Borough of Brooklyn, County of Kings, City and State of New York.

21

The premises covered by such mortgage are the same premises now owned by the debtor herein and described by the debtor in its petition as its sole asset. These premises for the sake of brevity will be hereinafter in this petition referred to as "the Mortgaged Premises".

The aforesaid declaration of trust was executed pursuant to an order of the Supreme Court of the State of New York, County of Kings, entered on December 5, 1938 pursuant to a plan of readjustment, etc. of the rights of the holders of investments in such mortgage. Copies of such declaration of trust, plan of readjustment, etc., interlocutory order and

22 *Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition*

final order approving such plan are annexed hereto, made a part hereof and marked Exhibits A, B, C and D respectfully.

HISTORICAL BACKGROUND OF THE MORTGAGE

2. On or about April 28, 1931 Marine Building Corporation, upon information and belief the then owner of Mortgaged Premises, delivered its bond in the principal amount of $370,000 to Title Guarantee & Trust Company and secured
23 the same with a mortgage to Title Guarantee & Trust Company upon the Mortgaged Premises in like amount. This mortgage was recorded in the office of the Register of the County of Kings on April 28, 1941 in Liber 7634 of Mortgages, page 128 and indexed under Block 6126.

Thereafter Title Guarantee & Trust Company sold participation certificates in said bond and mortgage to the general public, which certificates were guaranteed by Bond and Mortgage Guarantee Company under its guarantee number 181,568.

Upon information and belief, thereafter Marine Building Corporation conveyed the Mortgaged Premises to Marine Holding Corporation and on or about February 15, 1933
24 Marine Holding Corporati.. conveyed the Mortgaged Premises to Marine Harbor Properties, Inc., the debtor herein, by deed dated February 15, 1933 and recorded in the office of the Register of the County of Kings in Liber 5324 of Conveyances page 108.

REORGANIZATION OF THE MORTGAGE IN THE STATE COURT

3. Pursuant to an order of the Supreme Court, County of Kings, dated August 2, 1933 and entered in the office of the Clerk of the County of Kings on August 3, 1933, George S. Van Schaick, Superintendent of Insurance of the State of

Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition

New York, duly entered into the possession of the property and the conduct of the business and the rehabilitation of the Bond and Mortgage Guarantee Company, the guarantor of the above mentioned certificates of interest in said bond and mortgage.

Pursuant to powers granted to him as such rehabilitator under Sections 3 and 4 of Chapter 745 of the Laws of 1933 as amended (commonly known as the Schackno Act), George S. Van Schaick, Superintendent of Insurance of the State of New York, as such rehabilitator promulgated a plan for the readjustment, modification or reorganization of the rights of the holders of investments in the mortgage covering the Mortgaged Premises. Such plan contemplated the extension of the maturity date of the mortgage and the reduction of the rate of interest thereof. A copy of such plan is annexed hereto, made a part hereof and marked Exhibit E.

Notice of such plan was given, among others, to Marine Harbor Properties, Inc., the debtor herein as the then owner of the Mortgaged Premises.

Such plan came on to be heard before an Additional Special Term of the Supreme Court, County of Kings on October 24, 1934, at which time the debtor appeared by its then President, Abraham Hammer, and agreed in open court to the plan as promulgated by the Superintendent of Insurance and as amended by the court.

On November 24, 1934, the Supreme Court, County of Kings entered an interlocutory order approving the plan as proposed by the Superintendent of Insurance, amended by the court, and agreed to by the debtor and providing that the final order should be entered declaring the plan to be binding upon all parties thereto when 66⅔% of the holders in principal amount of the investments in such mortgage had approved the plan as amended: A copy of such interlocutory

28 *Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition*

order is annexed hereto, made a part hereof and marked Exhibit F.

On December 6, 1934 the Supreme Court, Kings County, entered a final order declaring that 66⅔% of the holders in principal amount of mortgage investments had consented to the plan and that the plan was binding upon all parties in interest. A copy of such final order is annexed hereto, made a part hereof and marked Exhibit G.

29 The plan as finally approved by the court and agreed to by the debtor herein provided, among other things, as follows:

A. That the Mortgage be extended three years until December 1, 1937.

B. That the owner of the Mortgaged Premises pay interest on the unpaid principal amount of the mortgage at the rate of 6% per annum to December 31, 1934 and at the rate of 5% per annum to December 1, 1937.

On March 11, 1935 Title Guarantee & Trust Company, being the then holder of record of said bond and mortgage, entered into an extension agreement with the debtor, Marine
30 Harbor Properties, Inc., extending the payment of the bond and mortgage in pursuance of the provisions of the said plan of readjustment as amended, as agreed to by the owner and approved by the Supreme Court, County of Kings. A copy of such extension agreement is annexed hereto, made a part hereof and marked Exhibit G-1.

DESIGNATION OF THE MORTGAGE CORPORATION OF NEW YORK, AS TRUSTEE

4. The Legislature of the State of New York, by Chapter 19 of the Laws of 1935 (commonly known as the Mortgage

Commission Act), provided for the establishment of a Mortgage Commission of the State of New York and vested in such Commission all the powers previously vested in the Superintendent of Insurance of the State of New York by Chapter 745 of the Laws of 1933 as amended. These powers included power to promulgate a plan of further readjustment of the rights of the holders of investments in certificated mortgages to the extent of the appointment of a trustee of the bond and mortgage under a Declaration of Trust in a form to be approved by the Court.

In pursuance of these powers on June 1, 1938, the Mortgage Commission of the State of New York promulgated a plan to modify the original plan (Exhibit B hereto) to the extent of appointing a trustee of the bond and mortgage under an approved form of Declaration of Trust. Notice of a hearing upon such plan was given, among others, to Marine Harbor Properties, Inc., the debtor herein, as owner of the Mortgaged Premises and this plan was brought on before the Supreme Court, Kings County, in the same proceedings as the original plan.

After a hearing upon such plan on June 27, 1938, the Supreme Court, County of Kings, entered an interlocutory order approving the form of Declaration of Trust, appointing The Mortgage Corporation of New York as trustee, and directing that upon the consent to such plan by 66⅔% in principal amount of the holders of mortgage investments in said mortgage that a final order be entered declaring the plan binding upon all parties in interest. A copy of such interlocutory order is annexed hereto as Exhibit C.

On December 6, 1938, a final order approving the plan and designating The Mortgage Corporation of New York as trustee was entered by the Supreme Court, County of

Kings. A copy of such final order is annexed hereto and marked Exhibit D.

Such final order provides in part as follows:

> "ORDERED that this Court, having assumed jurisdiction of this proceeding, shall retain jurisdiction hereof until the complete liquidation of the Trust Estate and the termination of the trust; and the Trustee, or any other interested party herein, may apply at the foot of this Final Order upon such notice as the Court may direct for such other and further relief as to the Court may seem just and proper."

On December 12, 1938, The Mortgage Corporation of New York, duly executed the Declaration of Trust in the form approved by the aforesaid final order of the Supreme Court, County of Kings. Thereafter, pursuant to said final order the Title Guarantee & Trust Company and the Mortgage Commission of the State of New York assigned to The Mortgage Corporation of New York, as trustee, the bond and mortgage, including the extension agreement, covering the Mortgaged Premises.

FORECLOSURE PROCEEDINGS IN THE STATE COURT

5. On May 1, 1941 The Mortgage Corporation of New York, as trustee, commenced proceedings in the Supreme Court, County of Kings, to foreclose the mortgage on the Mortgaged Premises for the following defaults in the payment of interest and taxes:

> The sum of $9,250, being interest payable April 1, 1941;

Real estate tax due April 1, 1941 in the sum of $5,681, plus penalties to May 1, 1941.

A lis pendens was filed on May 1, 1941 (a copy of which is annexed hereto, made a part hereof and marked Exhibit H) and copies of the summons and complaint (copies of which are annexed hereto, made a part hereof and marked Exhibit I) were served the same day upon the defendants, Louis H. Pink, Superintendent of Insurance of the State of New York and Morris S. Tremaine, Comptroller of the State of New York. The debtor herein as owner of the Mortgaged Premises appeared generally in the foreclosure action by notice of appearance dated May 27, 1941.

On an affidavit, sworn to May 3, 1941, requesting the appointment of a receiver pending the foreclosure action, an order was granted on May 5, 1941 by Hon. Algeron I. Nova of the Supreme Court, County of Kings, appointing Mortimer Rubinstein of 50 Court Street, Brooklyn, New York, as Receiver of rents and profits of the Mortgaged Premises. A copy of such order is annexed to this petition, made a part hereof and marked Exhibit J.

Thereafter and on or about May 6, 1941 Mr. Rubinstein qualified as such Receiver and has been in possession of the Mortgaged Premises since that date and has managed the same in accordance with the terms of the order of his appointment.

NEGOTIATIONS FOR THE FURTHER REORGANIZATION OF THE MORTGAGE

6. Under Article III of the Declaration of Trust (Exhibit A) petitioner as trustee may not extend or otherwise modify the mortgage without first obtaining the approval

of the Supreme Court, County of Kings, by application in the pending reorganization proceedings. The final order approving the appointment of petitioner as trustee (Exhibit D) provides the machinery for such an application. The pertinent portion of that order is quoted on page 6 of this petition.

Petitioner has therefore on numerous occasions discussed with representatives of the debtor corporation a further modification of the mortgage. It was hoped that as a result of these conferences a satisfactory plan might be agreed upon, which plan petitioner could submit for the approval of the Supreme Court, Kings County in the pending reorganization proceedings, pursuant to Article III of the Declaration of Trust. The debtor made two concrete offers which petitioner submitted to its Trust Committee.

The first offer on October 11, 1940 provided for an extension of five (5) years with interest at the rate of 4% and amortization of 2% per annum. This proposal the petitioner's Trust Committee declined, feeling that the only fair plan under the circumstances would be one providing for 4½% interest and 2% amortization.

The debtor's second proposal was submitted to the Trust Committee on August 11, 1941 and contemplated a five (5) year extension with interest at 4½% and amortization of 1½%. This proposal the Committee again turned down, feeling as before that the only fair plan was the one indicated.

After the commencement of the foreclosure action, petitioner made it a requirement to any plan for further reorganization of the mortgage that the arrears of taxes and interest be paid in full so that the foreclosure action might be discontinued prior to application to the Court.

Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition 43

PRESENT STATUS OF THE MORTGAGE

7. At the present time there are the following arrears upon the mortgage:

Principal due December 1, 1937	$370,000.00
Interest due April 1, 1941	9,250.00
Real estate taxes due April 1, 1941	5,681.00
Instalment of assessment due June 1, 1941	9.93
Total	$384,940.93

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On October 1, 1941, next Wednesday, the following additional sums will be due:

Interest October 1, 1941	$ 9,250.00
Real estate taxes October 1, 1941 (1st half 1941-1942)	5,724.00

As a result, on October 1, 1941, there will be due upon the mortgage the total amount of $399,814.93.

As indicated above, Mortimer Rubinstein, as Receiver, has been in possession of the Mortgaged Premises since May 6, 1941. During the period of his receivership, based upon figures submitted by him to petitioner, he has made 45 the following rent collections:

Month	*Income*	*Expense Disbursements*
April	$ 204.	
May	3,055.	$708.65
June	4,824.	595.79
July	4,755.	595.56
August	4,819.	611.28
September	410.	
October	189.	

Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition

Receiver now has on hand $8,580.37 with unpaid bills of approximately $750. All these figures are, of course, without deductions for Receiver's commissions or legal expenses.

Based upon his experience in operating the property, the Receiver has estimated to petitioner the following income from the property:

Collectible rent			$57,000.00
Expenses			
Salary	$7,200.00		
Coal	4,800.00		
Electrictiy	1,200.00		
Painting	1,800.00		
Elevator	600.00		
Refrigerators	1,200.00		
Management	2,280.00		
Ranges	600.00	$19,680	
Fixed charges			
Taxes	$11,000.00		
Water	1,100.00		
Insurance	1,200.00	13,300	
Total expenses			$32,980.00
Net income			$24,020.00

Based on this estimate, the property earns interest on the first mortgage of about 6⅔%.

When the Receiver took possession of the property, he advised petitioner that it was in a poor, run down condition. He estimates that the following repairs must be made to put the building in proper condition:

Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition

Paint the halls	$ 900.00
Paint fire escapes	450.00
Paint window trim and putty	1,200.00
Repair the roof	1,000.00
	$3,550.00

The affidavit of J. L. Long (annexed hereto, made a part hereof and marked Exhibit K) a qualified real estate appraiser employed by The Mortgage Corporation of New York, indicates the value of the Mortgaged Premises to be:

Land	$65,000.00
Building	285,000.00
	$350,000.00

or $49,000 less than the amount which will be due upon the bond and mortgage on October 1, 1941.

From the foregoing and from the petition filed by the debtor herein, petitioner respectfully submits that debtor's petition was not filed in good faith within the meaning of Section 146, Chapter X of the Bankruptcy Act.

The admitted sole asset of the debtor is the Mortgaged Premises which is covered by the $370,000 first mortgage held by petitioner as trustee.

In a reorganization proceeding under state statutes the Supreme Court, Kings County approved a reorganization of said mortgage to which debtor agreed.

In these same reorganization proceedings The Mortgage Corporation of New York was appointed trustee of said mortgage. By its order appointing petitioner as trustee (Exhibit D) the State Court expressly retains jurisdiction of

Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition

the proceeding until the complete liquidation of the trust estate (See Exhibit D, page 8) and provides that the "Trustee" or any other intereseted party may apply in the proceeding for further relief. Under this provision of said order petitioner may apply for approval of the further modification of the mortgage.

The Mortgage Corporation of New York as trustee for certificate holders has been in continuous possession of the bond and mortgage since December 12, 1938 under the direction and control of the Supreme Court of the State of New York. As such trustee petitioner is required to file a detailed annual accounting of its operations. Such accounts are judicially approved pursuant to statutory procedure by the Supreme Court, Kings County upon notice to certificate holders and others concerned.

The pending reorganization is but one of the many similar mortgage reorganizations before the State Courts under the machinery enacted by the Legislature of New York. This legislation was enacted for the protection of certificate holders and owners of real property subject to certificated mortgages following the collapse of the mortgage guarantee companies in 1933 and the depression in real estate values. As appears from the body of the petition, subsequent legislation was passed in 1935 (the Mortgage Commission Act) which sought to provide more adequate machinery in the light of two years of extensive reorganization experience. It was in pursuance of this latter act that petitioner was appointed as trustee.

The reorganization affecting this particular mortgage is pending before Mr. Justice George E. Brower in Special Term, Part VII of the Supreme Court, County of Kings. Mr. Justice Brower was designated by the Appellate Division

55

of the Supreme Court in 1934 to hear and pass upon such reorganization proceedings. Over a period of the last seven years millions of dollars in principal amount of mortgages, similar to the mortgage covering the Mortgaged Premises herein, have been reorganized in proceedings before him, and with the experience gained from these many proceedings of this nature, Mr. Justice Brower has been able to deal with these matters expeditiously and for the protection of certificate holders and property owners alike.

56

It is respectfully submitted therefore that in the pending State Court proceeding the rights of the certificate holders and debtor alike are being efficiently and fully protected and that to withdraw this mortgage from the pending State Court proceedings would not serve the best interests of the certificate holders therein.

In addition to the pending reorganization proceedings, petitioner, four months prior to the institution of the proceedings herein, commenced a foreclosure of the mortgage. A State Court Receiver has been appointed and has been in continuous possession of the Mortgaged Premises since May 6, 1941.

57

Petitioner believes that the State Court Receiver has been running the property in an efficient manner and collecting therefrom the maximum of rents obtainable.

It is respectfully submitted that to transfer the Mortgaged Premises from the State Court Receiver to a trustee in bankruptcy at this time would not serve the best interests of the certificate holders, since it would involve a change of operations at a critical time in the year and a duplication of expenses.

No plan of reorganization has been presented by the debtor and from the facts now before the Court, it is respectfully submitted that no feasible plan can be worked out.

58 *Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition*

The appraised value of the property (See Exhibit M [K.]) is $49,000 less than the present indebtedness upon the first mortgage alone. It is difficult, therefore, to see how the debtor can have any equity in the Mortgaged Premises.

Any reorganization should, in the opinion of petitioner, involve a substantial reduction of the principal of the mortgage in view of the present "top heavy" nature of the mortgage.

59 As previously indicated, two plans have already been submitted by the debtor to petitioner, both of which petitioner's Trust Committee, after due consideration, felt could not be recommended to the State Court in view of the inadequacy of the provisions. Petitioner has been and is now willing to recommend to the State Court that the mortgage be extended for five years and the interest reduced to 4½% per annum, if the debtor will pay 2% in reduction of principal each year. This plan the debtor has been unwilling to meet, despite the apparent earnings from the property.

In the pending reorganization proceedings in the State Court certificate holders consented to the designation of petitioner as trustee. The effect of such designation, as indicated
60 by the terms of the declaration of trust (Exhibit A) was to vest in petitioner as trustee "all the rights and powers of an absolute owner" which includes the right to extend or otherwise modify the bond and mortgage. This power is limited in one respect. Article III of the Declaration of Trust provides that the petitioner as trustee may so extend or modify only with the approval of the Supreme Court, Kings County.

WHEREFORE, petitioner prays for an order directing the debtor and the trustees appointed by the order of this Court dated September 17, 1941 to show cause why the order herein dated September 17, 1941, approving the debtor's petition,

Petition of The Mortgage Corporation of New York, as Trustee, to Vacate Order Approving Petition and to Dismiss Debtor's Petition. 61

should not be vacated and the debtor's petition dismissed and for such other and further relief as to the Court may seem just and equitable.

Petitioner is requesting that this matter be brought on by order to show cause in view of the fact that the time for the Receiver to comply with the directions contained in the order of this Court of September 17, 1941 expires on Monday, September 29, 1941.

No previous application has been made to this Court or any other court or judge for the relief requested herein. 62

Respectfully submitted,

THE MORTGAGE CORPORATION OF NEW YORK

By JOHN W. REYCRAFT.
Vice-President

UNITED STATES OF AMERICA
STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK

JOHN W. REYCRAFT, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge and belief. 63

JOHN W. REYCRAFT

Sworn to before me this
27th day of September, 1941

SAMUEL E. ZALOUM

SAMUEL E. ZALOUM
Notary Public, Kings Co.
N. Y. Co. Clerk's No. 27
N. Y. Co. Reg. 3-Z-19
Commission expires March 30, 1943.

64 EXHIBIT A, ANNEXED TO PETITION

Original filed in Kings
County Clerk's Office on 12/28/38
File #14668-33 Red #11726

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

IN THE MATTER

of

65 THE PEOPLE, etc. ex rel. George S. Van Schaick, Superintendent of Insurance, etc. BOND AND MORTGAGE GUARANTEE COMPANY.

IN THE MATTER

of a

Plan of Readjustment, etc. of the rights of the holders of investments in the mortgage guaranteed by Bond and Mortgage Guarantee Company under Guarantee No. 181,568.

66 IN THE MATTER

of the

Application of the Mortgage Commission of the State of New York, for an order approving a plan for the further readjustment of the rights of holders of investments in a certain mortgage covering premises known as 351 to 363 Marine Avenue, Brooklyn, County of Kings, New York, guaranteed by Bond and Mortgage Guarantee Company under Guarantee No. 181,568, to the extent of appointing a trustee, etc.

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The Mortgage Corporation of New York, a corporation organized under the Insurance Law of the State of New York, having its principal office at 42 Broadway, New York City, New York, having been duly appointed Trustee of the property, the subject of the above entitled proceeding, for the benefit of the holders of mortgage participation certificates guaranteed by the above named guarantee company under the above mentioned guarantee designation, by this Declaration of Trust which, by final order in the said proceeding, it is authorized to execute, hereby accepts the appointment as such Trustee, and hereby also declares and agrees as follows: 68

Certificate Holders

I. The term "Certificate Holder" means a holder of a certificate (commonly herein called a Mortgage Certificate) issued in his name and so registered on the books of the issuing company, which evidences the participating interest of the holder with respect to the bond and mortgage (or the bonds and mortgages) guaranteed by the above named guarantee company under the above mentioned guarantee designation, and shall also include a holder of a Trustee's Certificate issued in his name and so registered on the books of the Trustee, against a mortgage certificate surrendered by him or by a predecessor in interest to the Trustee. 69

Trust Estate

The term "Trust Estate" shall include the bond and mortgage (or the bonds and mortgages) against which were issued the Mortgage Certificates guaranteed by the above named guarantee company under the above mentioned guarantee designation, and all property, real, personal or mixed, in any manner and at any time or from time to time acquired on behalf of the Certificate Holders in lieu of or in addition

to the bond and mortgage (or the bonds and mortgages) aforesaid, together with all claims and choses in action which the Certificate Holders as a class have or may have against any person, firm or corporation with respect to any of the property now or formerly included in the Trust Estate.

Receipt of Trust Estate

The Trustee will take, hold, manage and control the property constituting the Trust Estate insofar as the same shall have been transferred to the Trustee or may have become
71 vested in it. The Trustee shall not be required to go into the transactions behind the items of any account or accounting furnished to it either by the guarantee company above named, or the Superintendent of Insurance of the State of New York or the Superintendent of Banks of the State of New York either Superintendent acting as rehabilitator or liquidator, or Mortgage Commission of the State of New York or any subsidiary corporation, agent or successor of any of such parties, where such items appear on their face to be regular and proper; but nothing herein contained shall be construed as in any wise restricting or affecting the right of the Trustee to demand or obtain such further and other accounting as the Trustee in its discretion deems to be
72 to the best interests of the certificate holders. The Trustee shall not be deemed to be relieved of the duty of reducing to possession any property which by the exercise of ordinary diligence it could have ascertained belonged to the Trust Estate.

Powers of Trustee

II. The Trustee is vested with all the rights and powers of an absolute owner of the property from time to time constituting the Trust Estate and may exercise any and all such rights and powers, including, without limiting the gen-

erality of the foregoing, the absolute, full and complete power to receive payments of interest, installments of principal and all other payments which are or may become due to the certificate holders; to enforce the claims of the certificate holders as a class against the above named guarantee company and against any other person, firm or corporation; to accelerate the due date of any bond and mortgage now or at any time an asset of the Trust Estate in accordance with the terms thereof or of any extension or modification agreement made with respect thereto; to obtain an assignment of rents and to manage, control and operate the property covered by any mortgage now or at any time an asset 74
of the Trust Estate; to foreclose any mortgage now or at any time an asset of the Trust Estate; to acquire, either by voluntary conveyance, or through a foreclosure sale, title to the real and/or other property covered by any mortgage now or at any time an asset of the Trust Estate, and, as to any real property, and its appurtenances, equipment and/or furnishings, with respect to which the Trustee may at any time be possessed of title for the benefit of the certificate holders, the Trustee shall have all the rights and powers of an absolute owner thereof and may exercise any and all such rights and powers including, without limitation of the foregoing, the absolute full and complete power to manage, control, 75
operate, repair, improve, rehabilitate and protect such property and pay the expenses thereof out of the income therefrom or out of the funds of the Trust Estate or out of advances made by the Trustee or out of monies borrowed in accordance with the provisions hereof or of the aforementioned final order; to make leases and agreements, reduce rents or otherwise modify present or future leases and agreements; to enforce and compromise claims and receive all debts, rent, income and assets growing out of such property which are or may become due, payable or deliverable from time to time; to discharge any and all liens and charges

against such property out of the income or proceeds thereof; to sell, with the approval of the Court, obtained as hereinafter provided in paragraph III, such property and take back, hold, enforce and protect a purchase money bond and mortgage. The Trustee may make, if it is authorized to engage in such business, or may procure, such title searches and title insurance as it deems advisable and pay the customary and reasonable charges therefor out of the Trust Estate. The Trustee may purchase with the funds in the Trust Estate, such fixtures, furniture and other personal
77 property as, in its opinion, are necessary or advisable for the operation of any real property now or at any time an asset of the Trust Estate. The Trustee shall be under no obligation to enforce any bond and mortgage now or at any time an asset of the Trust Estate, either by foreclosure or otherwise, unless it deems it advisable to do so and there are funds in its possession sufficient, in its opinion, to pay the necessary expenses of such foreclosure or other action or proceeding, or unless one or more certificate holders shall advance to the Trustee sufficient funds for such purpose. If, in the latter event, the Trustee shall deem it inadvisable to foreclose, it shall apply to the Supreme Court for instructions upon at least ten days' notice by mail to all of the
78 certificate holders. Any monies so advanced by any certificate holder or holders shall be repaid, with interest, to the person or persons making such advances, prior to any payment to the certificate holders generally.

Extension—Release—Sale

III. The Trustee shall not extend any bond and mortgage, reduce the rate of interest, release any property from any mortgage except as authorized by the terms thereof or the order above referred to, nor sell the securities or the property covered thereby, without the permission of the Court by order obtained in said reorganization proceeding

after ten days' notice by mail addressed to the certificate holders.

Application for Instructions

IV. The Trustee may apply to the Supreme Court, either *ex parte* or upon such notice as the Court may direct, for any other or further instructions regarding the Trust Estate or the duties of the Trustee hereunder any every such order shall be binding upon all of the certificate holders.

Loans—Advances 80

V. The Trustee may at its option (but shall not be required to) make advances or borrow monies for the purpose of paying taxes, water rates, assessments and/or insurance premiums, employing watchmen or caretakers, making repairs, alterations or improvements, paying expenses of foreclosures and/or the expenses of reorganization, or to purchase fixtures, furniture and other personal property which it deems necessary or advisable for the operation of property of the Trust Estate, which advances or loans, together with interest and the fees of the Trustee, shall be a first lien in favor of the Trustee upon the Trust Estate and may be paid with interest before payments are made to the certificate 81 holders.

Account—Filing—Objections

VI. The Trustee shall annually file an account in the Office of the Clerk of the County in which the above proceeding was instituted, and within ten (10) days after such filing, mail a copy thereof to each certificate holder and to Mortgage Commission of the State of New York, together with a notice setting forth that the said account will be brought on for hearing on a date specified in such notice,

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which shall be not less than twenty (20) days after the date of the mailing of said account and notice, and that at such time the Court will either approve, modify or reject the said account. Written objection to said account may be filed in the Office of the Clerk of the County in which the Trustee was appointed not less than five (5) days before such return day, and a copy of such objections shall at the same time be served upon the Trustee and the Mortgage Commission. If a certificate holder or other person in interest be not represented by an attorney, the Court may dispense with the filing of objections. The expense of printing
83 and mailing copies of such account shall be deemed an expense of administration and shall be paid by the Trustee out of the Trust Estate. Each such account shall contain a statement of (a) all of the Trustee's income, expenditures and distributions affecting the Trust Estate during the particular year involved, (b) the balance remaining in its hands at the end of such year and (c) its administration of the property. The Trustee in addition thereto, shall file an account in the Supreme Court whenever the holders of two-thirds in amount of such certificates shall file written request for such additional accounting and within thirty (30) days after such written request (but not oftener than once every
84 six months).

Distribution of Income

VII. The Trustee shall pay to the certificate holders at least semi-annually the net income received by it from the Trust Estate (after paying its fees and all expenses and advances and after setting up necessary reserves to operate the trust property).

Notice to Certificate Holders

VIII. All remittances, communications and notices to the certificate holders shall be mailed to each certificate

holder to his address as it appears upon the records of said Trustee, unless any certificate holder shall have filed with the Trustee at its address aforementioned, a written request designating another address for such purpose, whereupon it shall be mailed to the address so designated.

Commissions—Fees

IX. The Trustee by accepting this appointment waives any and all claims to statutory commissions and compensation for its services hereunder and in lieu thereof shall receive and accept, commencing with the next interest 86
period after the closing hereunder, annual compensation equal to one-twelfth of the income distributed to certificate holders but not less than one-quarter of one per cent. (¼ of 1%) per annum and not more than one-third of one per cent. (⅓ of 1%) per annum of the then unpaid principal amount of the bond and mortgage against which said participation certificates were issued; its compensation until the first interest day after the closing hereunder to be at the rate which The Mortgage Corporation of New York has been receiving as servicing agent. In the event that the trust is terminated, the Trustee shall receive compensation at the applicable rate accrued to the date of termination. In the event that there is a junior participating interest in said 87
bond and mortgage not held by the Trustee, then such annual compensation shall be computed on the basis of the senior participation interest in said bond and mortgage. If more than one bond and mortgage is involved in the above entitled proceeding, then, and in that event, the expression "bond and mortgage," wherever above used in this paragraph, shall be regarded as referring to "bonds and mortgages," and the minimum annual compensation of the Trustee shall be not less than one-half of one per cent. (½ of 1%) per annum of the then unpaid aggregate principal amount of such bonds

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and mortgages. In addition to such annual compensation, the Trustee shall be entitled to a management charge or fee, computed on the basis of the applicable rates set forth in the schedule marked Schedule "A" hereto annexed, and made a part hereof, with respect to any real property at any time held in the Trust Estate or operated by the Trustee for the benefit of the certificate holders pursuant to assignment of rents or otherwise, which management charge or fee it may pay in whole or in part to a managing agent, or retain, as it sees fit; and the Trustee shall not be entitled to any other credit or deduction for payments to any managing agent, ex-
89 cept payments to such an agent of rental commissions in accordance with Schedule "A" hereto annexed. Out of its compensation, above provided for, the Trustee shall pay the fees of any counsel which it may employ to advise it with respect to the administration of the Trust Estate or its duties hereunder or the preparation of any accounting which it may make. The fees and expenses of any counsel which the Trustee may employ in legal proceedings brought in or concerning the enforcement or administration of the trust, or in any action or proceeding to which it is a party, as fixed and determined by the Court upon an application made for such purpose, shall be proper charges against the Trust
90 Estate, and payable out of the assets thereof.

Brokerage Commissions

X. The Trustee may pay to brokers, as operating costs of the Trust Estate, the usual commissions for effecting sales, leases or renewal of leases.

Termination—Modification—Final Account

XI. This trust shall continue until the Trust Estate has been fully liquidated, except that at any time prior thereto, this trust, with the approval of the Supreme Court, upon the

consent thereto, in writing duly acknowledged, of the holders of two-thirds of the principal amount of the certificates, may be modified (with the consent of the Trustee) or terminated or the Trustee removed and a successor Trustee appointed. Within sixty days after the full liquidation of the Trust Estate, or in liquidation so far as the Trustee finds itself able to accomplish that end, the Trustee shall render and file with the Court its final account and mail copies thereof to all of the certificate holders at their last known addresses together with a notice of motion setting forth the time when and the place where an application to the Court for confirmation and approval of such account, the termination of the trust and the discharge of the Trustee will be made. Any assets of the Trust Estate left remaining in the hands of the Trustee shall be disposed of as the Court may direct in the order entered on such application. 92

Resignation of Trustee

The Trustee may resign at any time by obtaining leave of the Court after giving the certificate holders at least thirty days' notice by mail of its intention to apply for such resignation, and if such resignation is approved by the Court, the Court will appoint its successor. In the event of the resignation or removal of the Trustee, it shall within sixty days thereafter file its final account with the Court and mail copies thereof to all registered holders of certificates, and said Trustee shall dispose of any funds or property held by it as the Court shall direct. 93

Trust Funds Only Liable

XII. Any one contracting with the Trustee shall look only to the funds and property of the Trust Estate for payment under such contract.

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Registration of Certificates

XIII. Each holder of a mortgage certificate shall present his mortgage certificate to the Trustee for registration by it and for a notation thereon that the rights of the holder thereof are subject to all of the provisions of this Declaration of Trust, to the Plan of Reorganization, as approved, respecting the mortgage investment here concerned and to the proceedings of the Supreme Court pursuant to which this Declaration of Trust has been executed. All funds and other benefits payable in respect to mortgage certificates not
95. so registered, shall be set aside by the Trustee in a special fund to be paid over, but without interest, to the owner of the mortgage certificate in respect of which such funds are applicable, upon the due registration of such certificate with the Trustee.

Transfer of Certificates

XIV. Any party who has rightfully acquired, by purchase or otherwise, a mortgage certificate issued in the name of another, may surrender such certificate to the Trustee duly endorsed or assigned for transfer, and receive therefor a Trustee's Certificate with respect thereto, issued in his name and so registered on the books of the Trustee. Such Trustee's
96 Certificate shall contain a statement to the effect that the said mortgage certificate has been surrendered to the Trustee, that the Trustee holds the same for the account of the registered holder and owner of the Trustee's Certificate issued and outstanding against said mortgage certificate and that the party in whose name the Trustee's Certificate is issued, is registered on the books of the Trustee as the registered holder of said Trustee's Certificate and that the rights of such party in and to such mortgage certificate are subject to all of the provisions of this Declaration of Trust, to the

Plan of Reorganization, as approved, respecting the mortgage investment here concerned, and to the proceedings of the Supreme Court pursuant to which this Declaration of Trust has been executed. The Trustee's Certificate shall also contain such other or further statements or recitals as the Trustee deems proper and it shall be transferable only on the books of the Trustee, upon surrender of the certificate transferred.

Lost, etc. Certificates—Indemnity Bond

Any holder who has lost his mortgage certificate or whose 98
mortgage certificate has been destroyed, mutilated or stolen, may become a registered holder, in case his certificate has not been registered with the Trustee prior to such destruction, loss, mutilation or theft, and any certificate holder shall be entitled to receive from the Trustee a Trustee's Certificate in such form as the Trustee may prescribe, evidencing his rights in and to such mortgage certificate, by furnishing to the Trustee (1) his sworn affidavit with respect to such loss, destruction, mutilation or theft, in such form and detail as may be prescribed by the Trustee, and (2) an indemnity bond in such amount as may be required by the Trustee, and issued by a surety company or other indemnitor or indemnitors acceptable to the Trustee. In a situation 99
involving a mutilated certificate, the Trustee may require the surrender of such mutilated certificate as a condition to the issuance of its Certificate.

Any party who subsequently rightfully acquires, by purchase or otherwise, any Trustee's Certificate issued as aforesaid, may in turn surrender same to the Trustee duly endorsed or assigned for transfer, and received therefor a Trustee's Certificate in similar form, issued in his name and so registered on the books of the Trustee.

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Trustee May Make Regulations for Registration, etc.

The Trustee may make such rules respecting the registration of mortgage certificates and the issuance and transfer upon its books of the Trustee's Certificates above provided for as it may deem reasonable and proper, and among other things it may require, (1) the payment of any transfer taxes and other governmental charges required to be paid in the matter, (2) the registration of the mortgage certificate involved in conformity with paragraph XIII hereof and (3) compliance with the practice, custom and procedure prevail-
101 ing in the City of New York in connection with the transfer of stocks and bonds. The Trustee may close its books for the registration of Trustee's Certificates or for the transfer of such certificates, for five days immediately prior to any periodic distribution of principal or income of the Trust Estate to certificate holders. The Trustee may permit two or more persons to be a registered holder under this trust of the same mortgage certificate and of a Trustee's Certificate and the recital of the rights of a holder here given in the singular shall include the rights in proportion to their interest when two or more persons are the registered holders on the books of the Trustee or the holder of a Trustee's Certificate or of an undivided interest in a mortgage certifi-
102 cate and in a Trustee's Certificate issued in respect thereto.

Participation of Guarantee Company

XV. Until a final judgment of a Court of competent jurisdiction shall have been obtained determining to what extent, if any, the participation of the above mentioned guarantee company in the guaranteed mortgage investment shall be entitled to the benefits of this trust, the pro rata share of said guarantee company in the Trust Estate in the net income and/or the net proceeds of the sale or liquidation

thereof shall be retained by the Trustee and deposited in a separate account, the same not to bear interest.

Deposit of and Interest on Trust Funds

XVI. The Trustee may keep moneys belonging to the Trust Estate on deposit in any bank or trust company in New York City, and shall not be under any obligation to pay interest on such moneys on deposit in such bank or trust company. The Trustee may commingle moneys belonging to the Trust Estate with moneys belonging to any other trust estate held under a Declaration of Trust substantially similar to this one, but shall not mingle moneys belonging to the Trust Estate with its own general funds. 104

Holding of Trust Property

XVII. The Trustee may hold in its own name as Trustee any or all of the property of the Trust Estate or in the exercise of its discretion and, with the approval of the Court, obtained either *ex parte* or upon such notice as the Court may direct, may hold any of such property in the name of an individual, partnership or corporation as its nominee, but it shall be responsible for the acts of such nominee. The cost of forming a corporation to act as such nominee, and the annual franchise taxes or other taxes of such corporation shall be proper expenses of the Trust Estate, if allowed by the Court. 105

Acceptance of H.O.L.C. bonds, etc.

XVIII. The Trustee may satisfy or assign any bond and mortgage at any time held in the Trust Estate in consideration of Home Owners' Loan Corporation bonds, or bonds issued by any other Federal or State agency provided the same are in an amount equal to the then unpaid principal

amount owing on said bond and mortgage with accrued interest. The Trustee may, with the approval of the Court, with or without notice to certificate holders as the Court may direct, satisfy or assign any bond and mortgage any time held in the Trust Estate in consideration of Home Owners' Loan Corporation bonds, or bonds issued by any other Federal or State agency, in an amount less than the then unpaid principal amount of said bond and mortgage and accrued interest.

Who Bound

107 XIX. This Declaration of Trust is binding upon the Trustee herein named and its successor, and upon all certificate holders whether such certificates are registered with the Trustee as herein provided or not, their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, THE MORTGAGE CORPORATION OF NEW YORK as the Trustee herein named has caused this Indenture to be executed by its duly authorized officer and its corporate seal to be affixed this 12th day of December, 1938.

108 By (SIGNED) P. E. BENNETT
President

[SEAL]

By (SIGNED) C. H. HEINLEIN
Secretary

Exhibit A, Annexed to Petition 109

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 12th day of December, 1938, before me personally came P. E. BENNETT, to me known, who being by me duly sworn, did depose and say that he resides at 66—78th Street, Brooklyn, New York; that he is President of THE MORTGAGE CORPORATION OF NEW YORK, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation and that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that 110
he signed his name thereto by like order.

H. F. WILLIAMS JR.
Notary Public, Queens County
Queens Co. Reg. No. 4876, Clerk's No. 2096
Kings Co. Reg. No. 9008, Clerk's No. 3
New York Co. Reg. No. 9W20 Clerk's No. 19
Nassau Co. Clerk's No. 9W6
Certificate Filed in Suffolk County
Term Expires March 30, 1939

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112 EXHIBIT D, ANNEXED TO PETITION

At a Special Term Part VII (formerly the Additional Special Term) of the Supreme Court of the State of New York, held in and for the County of Kings, at the County Court House, in the Borough of Brooklyn, City of New York, on the 5th day of December, 1938.

Present:

HON. GEORGE E. BRUWER,
Justice.

113 IN THE MATTER
of the
Application of the People of the State of New York, by George S. Van Schaick, Superintendent of Insurance of the State of New York, for an order to take possession of the property of and rehabilitate the Bond and Mortgage Guarantee Company.

IN THE MATTER
of a
Plan of readjustment etc. of the rights of the holders of investments in a certain mortgage covering premises 351 to 363 Marine Avenue, Brooklyn, New York, guaranteed by Bond and Mortgage Guarantee Company, Guarantee No. 181,568.

114 IN THE MATTER
of the
Application of the Mortgage Commission of the State of New York, for an order approving a plan for the further readjustment of the rights of holders of investments in a certain mortgage covering premises 351 to 363 Marine Avenue, Brooklyn, New York, guaranteed by Bond and Mortgage Guarantee Company, Guarantee No. 181,568, to the extent of appointing a trustee of the bond, mortgage or other security against which such mortgage investments were issued, and defining the powers and duties of such Trustee, and modifying the final order approving the original plan of readjustment of the rights of the holders of investments in said mortgage.

FINAL ORDER No. 270 M

Exhibit D, Annexed to Petition 115

The Legislature of the State of New York by Chapter 745 of the Laws of 1933, as amended, and Chapter 19 of the Laws of 1935, as amended, having duly declared the existence of a public emergency affecting the health, safety and comfort of the People of the State of New York, and Mortgage Commission of the State of New York, having duly formulated and promulgated a plan (referred to in these proceedings as the "Modified Plan") to effect the further readjustment, modification or reorganization of the rights of the holders of investments represented by guaranteed mortgage participation certificates in a certain mortgage covering premises 351 to 363 Marine Avenue, Brooklyn, City and State of New York, to 116
the extent of appointing a Trustee of the bonds, mortgages and other security against which such mortgage investments have been issued, and transferring to such Trustee the title to such bonds, mortgages and other security upon such trusts, terms and conditions as are set forth in the Modified Plan of readjustment, etc., and due notice of a hearing upon such Modified Plan having been duly given by Mortgage Commission of the State of New York to the holders of all mortgage investments represented by participation certificates in said mortgage and to all persons, firms, associations or corporations known to Mortgage Commission to have an interest which might be affected by the proposed Modified Plan, and 117
the hearing upon such notice having come on regularly to be heard before this Court on the 27th day of June, 1938, at 10 A. M., at the County Court House, in the Borough of Brooklyn, City and State of New York, and Mortgage Commission of the State of New York, having duly appeared by Maurice Finkelstein (James F. Donlan and Benjamin Harwood Jr., of counsel) Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of Bond and Mortgage Guarantee Company, having duly appeared by J. Donald Whelehan, Title Guarantee and Trust Company having duly appeared by C. Elmer Spedick (Edward F. Kiernan, of counsel) The Mortgage Corporation of New York having

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duly appeared by Hughes, Richards, Hubbard & Ewing (Curtiss E. Frank, of counsel) a Committee of Holders of Guarantees of Bond and Mortgage Guarantee Company having duly appeared by Herrick & Feinstein (Abraham Feinstein, of counsel)

Now, upon reading and filing the notice given by Mortgage Commission of the State of New York, dated June 1, 1938, the Modified Plan annexed thereto promulgated by Mortgage Commission of the State of New York, the affidavit of George I. Bauman, Special Supervisor of Mortgage Com-
119 mission of the State of New York, sworn to June 22, 1938, the annexes A, B and B-1 attached thereto, the written consents of the holders of two-thirds in principal amount of such mortgage investments (exclusive of any part thereof held by the guaranty corporation which sold or guaranteed such mortgage investments), the testimony of the witnesses appearing at said hearing, the exhibits received in evidence, and the approval of the Modified Plan by the Mortgage Commission of the State of New York having been given in open court, and, upon all plans, orders and proceedings heretofore had herein,

And it appearing to my satisfaction that heretofore, pur-
120 suant to Sections 3 and 4 of Chapter 745 of the Laws of 1933 of the State of New York, as amended, the Superintendent of Insurance exercised the powers therein granted him and took over all the functions of Bond and Mortgage Guarantee Company with respect to each mortgage investment sold or guaranteed by that Company, including the mortgage investments involved in this proceeding, and that heretofore the Superintendent of Insurance of the State of New York, pursuant to the powers vested in him under said Chapter 745 of the Laws of 1933 as amended, duly instituted and brought on for hearing before the Supreme Court of the State of New York, County of Kings, a special proceeding to secure judicial action upon a plan of readjustment, modification or reorganization of the rights of the holders of investments in the above

described mortgage (referred to in these proceedings as the "Original Plan"), which Original Plan after due hearing was approved by this Court and declared binding upon all holders of investments and other interested parties therein by a final order entered in the office of the Clerk of the County of Kings, which Original Plan and order did not provide for the appointment of a trustee of the bond and mortgage and other security against which such mortgage investments were issued and did not transfer the title of such bond, mortgage and other security to a trustee; that no trustee of the bond and mortgage against which these mortgage 122
investments were issued has ever been appointed; that the mortgage investments did not at any time come into the control of the Mortgage Commission of the State of New York pursuant to Section 6 of Article IV of the Mortgage Commission Act; that Mortgage Commission of the State of New York promulgated the aforementioned Modified Plan of readjustment under date of June 1, 1938, pursuant to Chapter 745 of the Laws of 1933 of the State of New York, as amended; that Mortgage Commission obtained a list of the holders of the mortgage investments in said mortgage from The Mortgage Corporation of New York, which corporation as successor servicing agent to Bond and Mortgage Guarantee Company now maintains the list of such holders previ- 123
ously kept by Bond and Mortgage Guarantee Company; that Mortgage Commission submitted such Modified Plan to all the holders of mortgage investments named on said list and to all other persons, firms, associations or corporations known to Mortgage Commission to have an interest which might be affected by said Modified Plan by mailing a copy of the said Modified Plan, postage prepaid, to each such holder addressed to him at the address set forth in said list and to the said other persons, firms, associations or corporations at the last address of such persons, firms, associations or corporations as known to Mortgage Commission, together with a notice stating in substance that the said Modified Plan would be presented to this Court on a date which was not

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less than twenty (20) days after the mailing of such plan and notice, and that upon such date this Court would pass upon such Modified Plan and hear any objection thereto on the part of any holder of any such mortgage investment or such other party as might have an interest therein; that, since the date of the mailing of said Modified Plan and notice, a copy thereof has been kept by Mortgage Commission of the State of New York at its office, 346 Broadway, New York, N. Y., available for public inspection, and that more than two-thirds of the holders in principal amount of such mortgage investments (exclusive of any part thereof held by the
125 guaranty corporation which sold or guaranteed such mortgage investments) have given their written consent to such Modified Plan, and that such Modified Plan was approved by this Court by interlocutory order granted on the 23rd day of July, 1938;

Now, on application of Maurice Finkelstein, Esq., attorney for Mortgage Commission of the State of New York, it is

Ordered that the said Modified Plan providing for the further readjustment, modification and reorganization of the rights of the holders of mortgage investments represented by guaranteed mortgage participation certificates in the mort-
126 gage covering premises known as 351 to 363 Marine Avenue, Brooklyn, New York, as promulgated by Mortgage Commission of the State of New York, and approved by this Court, is hereby declared to be binding upon all the holders of mortgage investments in said mortgage, the Superintendent of Insurance of the State of New York, as Liquidator of Bond and Mortgage Guarantee Company, Title Guarantee and Trust Company, The Mortgage Corporation of New York, the owner or owners of the underlying real estate, and all other parties interested therein, and it is further

Ordered that The Mortgage Corporation of New York be and it hereby is appointed Trustee of all the property constituting the Trust Estate; and it is further

ORDERED that Title Guarantee and Trust Company be and it hereby is authorized and directed forthwith to assign, transfer, set over and deliver unto The Mortgage Corporation of New York, as Trustee, in so far as the same shall be in its possession or control, the said bonds and mortgages and any and all assignments thereof (with adequate instruments for the transfer thereof to the said Trustee "without recourse" and in form sufficient for recording) and shall also assign, transfer and deliver unto the said Trustee all cash and other property, real, personal or mixed, securing or intended to secure the certificates issued against the mortgage which is the subject matter of this proceeding, together with a certified list of the holders of such certificates; and Mortgage Commission of the State of New York be and it hereby is authorized and directed to execute any and all such instruments as may be necessary or desirable to effectuate such transfer; and it is further 128

ORDERED that upon the execution of the assignment provided for in this order, the agency of The Mortgage Corporation of New York to service the mortgage investments herein as provided for in the Original Plan and the order or orders approving same shall terminate, and Title Guarantee and Trust Company, Mortgage Commission of the State of New York and The Mortgage Corporation of New York be and they hereby are authorized and directed to take such steps as may be necessary to cancel any servicing agreement entered into by these parties pursuant to the order of this Court approving the Original Plan; and it is further 129

ORDERED that the said Trustee be and it hereby is authorized and directed to execute, as soon as reasonably convenient after the entry of this order, a declaration of trust, substantially in the form annexed to the notice of proceeding herein and marked Exhibit "A", with such modifications of a non-substantial nature as the attorneys for the Trustee

and the attorneys for the Mortgage Commission of the State of New York may deem necessary; and it is further

ORDERED that any provisions of the Original Plan or of the order or orders approving same, which are inconsistent with the provisions of this Modified Plan as approved by this Final Order be and the same hereby are in all respects superseded by the provisions of this Modified Plan as approved and declared binding by this Final Order, and that the Original Plan and the order or orders approving same be and they hereby are modified by this Modified Plan as
131 approved and declared binding by this Court; and it is further

ORDERED that all interested parties be and they hereby are authorized and directed to execute any and all papers, instruments and/or documents, and do all things necessary or desirable to effectuate the consummation of said Modified Plan hereby approved and declared to be binding; and it is further

ORDERED that this Court, having assumed jurisdiction of this proceeding, shall retain jurisdiction hereof until the complete liquidation of the Trust Estate and the termination of the trust; and the Trustee, or any other interested party
132 herein, may apply at the foot of this Final Order upon such notice as the Court may direct for such other and further relief as to the Court may seem just and proper.

Enter

GEO. E. BROWER
J. S. C.

Granted
December 6, 1938

JOHN N. HARMAN
Clerk

EXHIBIT E, ANNEXED TO PETITION. 133

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS.

IN THE MATTER

of the

Application of the PEOPLE OF THE STATE OF NEW YORK, by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property of and rehabilitate the

BOND AND MORTGAGE GUARANTEE COMPANY.

IN THE MATTER

of a

Plan of readjustment, etc., of the rights of the holders of investments in a certain mortgage covering premises *351 to 363 Marine Avenue,* Brooklyn, New York, guaranteed by Bond and Mortgage Guarantee Company, Guarantee No. *181,568.*

134

NOTICE OF PROCEEDING UNDER CH. 745 OF THE LAWS OF 1933, AS AMENDED

No. 270

135

Sir:

A plan for the readjustment, modification or reorganization of the rights of the holders of investments in a mortgage covering premises *351 to 363 Marine Avenue,* Brooklyn, New York, guaranteed by Bond and Mortgage Guarantee Company (Guarantee No. *181,568*) has been promulgated by George S. Van Schaick, Superintendent of Insurance of the

136 *Exhibit E, Annexed to Petition*

State of New York, he having heretofore exercised the powers granted to him under Sections 3 and 4 of Chapter 745 of the Laws of 1933, as amended.

A copy thereof is herewith submitted to you by the Superintendent of Insurance of the State of New York, pursuant to the provisions of Section 6 of Chapter 745 of the Laws of 1933, as amended.

A copy of said plan will be kept by me, the Superintendent of Insurance, at my office at 160 Broadway, New York, N. Y., and a copy of said plan and the agreement relating
137 thereto will be kept at Bond and Mortgage Guarantee Company, Certificate Reorganization Division, 16 Court Street, Brooklyn, N. Y.

PLEASE TAKE NOTICE that such plan will be presented to the Supreme Court, Kings County, at an *Additional Special Term* thereof, to be held on *October 24, 1934, at 10* o'clock in the forenoon of that day or as soon thereafter as counsel can be heard before Mr. Justice George E. Brower, one of the Justices of said Court, in the Special Term, Part VI Courtroom, in the County Court House, at Joralemon and Fulton Streets, in the Borough of Brooklyn, City and State of New York, at which time the Court will pass upon such
138 plan and hear any objection thereto on the part of any holder of such mortgage investment, or on the part of any other party as may have an interest thereunder; and hear and pass upon such other and further proposals for the benefit of certificate holders as the Court may deem proper; and

PLEASE TAKE FURTHER NOTICE that at such time the Court will be asked to enter an order approving, modifying or disapproving such plan or agreement and in the event of an order approving such plan as submitted or modified to enter an order providing that such plan so approved shall be binding upon all holders of investments in said mortgage upon satisfactory proof of the fact that 66⅔ per centum of the

holders in principal amount of such holders shall have approved the same.

Dated: September 21, 1934.

Yours, etc.,

GEORGE S. VAN SCHAICK,
Superintendent of Insurance of the State of New York.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for said Superintendent of Insurance, 140
100 Broadway,
Borough of Manhattan,
City of New York.

To:

ALL HOLDERS OF INVESTMENTS IN SAID MORTGAGE.

BOND AND MORTGAGE GUARANTEE COMPANY,
16 Court Street,
Brooklyn, N. Y.

TITLE GUARANTEE AND TRUST COMPANY,
176 Broadway,
New York City.

C. ELMER SPEDICK, Esq., 141
26 Court Street,
Brooklyn, N. Y.

JAMES D. MCCAULEY, Esq.,
100 Broadway,
New York, N. Y.

BOND AND MORTGAGE GUARANTEE CORPORATION,
c/o Mr. B. J. O'Brien,
16 Court Street,
Brooklyn, N. Y.

MARINE HARBOR PROPERTIES, INC.,
1441 Broadway,
New York, N. Y.

142 *Exhibit E, Annexed to Petition*

Plan for the Readjustment, Modification or Reorganization of the Rights of All the Holders of Investments in a Certain Mortgage, Covering Premises *351 to 363 Marine Avenue,* Borough of Brooklyn, City and State of New York, and Guaranteed by Bond and Mortgage Guarantee Company, Designated as Guarantee No. *181,568* of That Company.

I, GEORGE S. VAN SCHAICK, Superintendent of Insurance of the State of New York, having heretofore exercised the powers granted to me under Sections 3 and 4 of Chapter
143 745 of the Laws of 1933 of the State of New York as amended, hereby promulgate the following plan for the readjustment, modification and reorganization of the rights of the holders in the mortgage investments above described pursuant to Chapter 745 of the Laws of 1933 of the State of New York as amended.

PRESENT STATUS OF THE MORTGAGE

The property affected by the mortgage is located at 351 to 363 Marine Avenue, in the Borough of Brooklyn, County of Kings, City and State of New York, and consists of an irregular plot of land on the northwest corner of Marine Ave-
144 nue and 4th Avenue, having a frontage on Marine Avenue of 214 feet, and approximately 214 feet in the rear thereof, and a frontage on 4th Avenue of approximately 114 feet, and 122 feet in the rear thereof. There is erected on said plot a six-story and cellar brick, store and apartment building, containing three stores and 312 rooms, subdivided into 103 apartments.

The mortgage is in the present sum of $370,000.00, bears interest at the rate of six per centum (6%) per annum and will mature on December 1, 1934.

The mortgage is held by Title Guarantee and Trust Company, of record, against which there were issued by said Trust

Company mortgage participation certificates to ninety-seven (97) holders.

The present owner of the property is Marine Harbor Properties, Inc., whose address is 1441 Broadway, New York, N. Y. The owner states that the Marine Building Corporation, the present obligor on the bond, is financially irresponsible and will not execute the extension agreement hereinafter mentioned.

The arrears against these premises at September 21, 1934, consisted of the balance of the April 1, 1934 tax, in the sum of $3,372.75. The second half of the 1934 tax, in the amount of $5,409.25, will become due and payable October 1, 1934. On the same day, semi-annual interest in the sum of $11,100 will be due.

PLAN OF REORGANIZATION

Term:

The time for the payment of the unpaid principal amount of the mortgage shall be extended for an additional period of two years and four months from December 1, 1934, the present maturity date, to April 1, 1937.

Interest:

The interest payable by the owner upon the unpaid principal amount of the mortgage shall be at the rate of five per centum (5%) per annum from April 1, 1934 to April 1, 1937, the extended maturity date.

Arrears and Accruing Charges:

The owner has agreed, pending the approval of this plan, to pay on the first day of each and every month, a sum equivalent to one-twelfth of the annual charges of interest, taxes, water rates and assessments. The owner further agrees, simultaneously with the proper delivery of the extension agree-

148 *Exhibit E, Annexed to Petition*

ment hereinafter mentioned, to pay all arrears of interest, taxes, water rates and assessments that may be unpaid at that time. Thereafter interest is to be payable semi-annually on the first days of April and October of each year, and all taxes, water rates and assessments are to be paid promptly when the same shall become due and payable.

Extension Agreement:

The owner has agreed to execute, acknowledge and de-
149 liver an extension agreement upon the foregoing terms and including other appropriate provisions not inconsistent therewith. Form of the proposed extension agreement will be filed with the Court as part of the record in this proceeding. Upon approval of this plan, the Court will be requested to direct Title Guarantee and Trust Company, upon the execution and delivery of said extension agreement by the owner and upon payment by the owner of the recording fees and revenue stamps thereon, if any, to execute and deliver the same as record holder of such mortgage.

Service:

The agency of the Bond and Mortgage Guarantee Com-
150 pany to service the mortgage will be revoked and Bond and Mortgage Guarantee Corporation will be appointed to service the mortgage during the extended period thereof. A form of the proposed servicing agreement will be filed with the Court as a part of the record in this proceeding. Upon the approval of this plan, the Court will be requested to direct Title Guarantee and Trust Company, as mortgagee of record, to enter into such servicing agreement with Bond and Mortgage Guarantee Corporation. The Court may, upon application of sixty-six and two-thirds per centum (66⅔%) in amount of the holders of investments in said mortgage, substitute a different servicing agent.

Exhibit E, Annexed to Petition 151

Service Charges:

The servicing agent shall be entitled to deduct and retain from the interest payments collected a sum equal to one twelfth (1/12) of such payments, as its servicing fee or charge.

Guarantee:

The guarantee of Bond and Mortgage Guarantee Company as evidenced by its existing guaranty policy covering this mortgage shall be continued for the extended period of the mortgage, but the guarantee shall be limited to the unpaid balance of principal and to the interest rate to be received by the certificate holders under this plan as finally approved. The Bond and Mortgage Guarantee Company has agreed that the employment of the Bond and Mortgage Guarantee Corporation as servicing agent shall not operate as such a revocation of its agency as would entitle it to claim that the policy of guarantee has been terminated. By consenting to this extension, the Superintendent of Insurance of the State of New York as Rehabilitator of Bond and Mortgage Guarantee Company is not adopting or agreeing to adopt the above numbered guarantee as the undertaking or obligation of the Rehabilitator, and the holders thereof acquire no priority or preference to payment out of the assets of Bond and Mortgage Guarantee Company which they did not have prior to this extension. 152 153

Expenses:

The owner has agreed to pay Bond and Mortgage Guarantee Company a reorganization fee and accordingly no charge or assessment will be made against certificate holders for disbursements or other expenses involved in this proceeding.

Dated: New York, September 21, 1934.

GEORGE S. VAN SCHAICK,
Superintendent of Insurance of the
State of New York

154

EXHIBIT G, ANNEXED TO PETITION

At an Additional Special Term of the Supreme Court of the State of New York, held in and for the County of Kings, at the County Court House, in the Borough of Brooklyn, City of New York, on the 28 day of November, 1934.

Present:

Hon. GEORGE E. BROWER,
Justice.

155

IN THE MATTER
of the
Application of the PEOPLE OF THE STATE OF NEW YORK, by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property of and rehabilitate the
BOND AND MORTGAGE GUARANTEE COMPANY.

IN THE MATTER
156
of a
Plan of readjustment, etc., of the rights of the holders of investments in a certain mortgage covering premises 351 to 363 Marine Avenue, Brooklyn, New York, guaranteed by Bond and Mortgage Guarantee Company, under Guarantee No. 181,568.

FINAL ORDER No. 270

A proceeding having been duly instituted by George S. Van Schaick, Superintendent of Insurance of the State of

New York, to obtain judicial approval of a plan of readjustment, modification and reorganization of the rights of the holders of mortgage investments represented by guaranteed mortgage participation certificates in a certain mortgage made by Marine Building Corporation to Title Guarantee and Trust Company, dated April 28, 1931, covering premises 351 to 363 Marine Avenue, Brooklyn, New York, and the said proceeding having come on regularly to be heard before this Court on the 24th day of Octbber, 1934 at 10 A. M., at the County Court House, in the Borough of Brooklyn, City of New York, and an interlocutory order therein having been entered the 24th day of November, 1934, and it now appearing to the satisfaction of this Court that more than two-thirds of the holders of said mortgage investments (exclusive of any part thereof held by the guarantee company which sold or guaranteed such mortgage investments) have given their written consent to the said plan which said consents have been filed with this Court as part of the record in this proceeding, 158

Now, upon motion of Hughes, Schurman & Dwight, Esqs., attorneys for George S. Van Schaick, Superintendent of Insurance of the State of New York, as Rehabilitator of Bond and Mortgage Guarantee Company, it is 159

ORDERED, that the said plan providing for the readjustment, modification and reorganization of the rights of the holders of investments represented by guaranteed mortgage participation certificates in the mortgage covering premises 351 to 363 Marine Avenue, Brooklyn, New York, as promulgated and approved by the Superintendent of Insurance of the State of New York and presented to and approved by this Court by an order dated the 23rd day of November, 1934, is hereby declared to be binding upon all the holders of investments in said mortgage, upon Bond and Mortgage

160 *Exhibit G, Annexed to Petition*

Guarantee Company, upon Title Guarantee and Trust Company, mortgagee of record, and Marine Harbor Properties, Inc., the owner of the mortgaged premises, and upon all other parties interested therein, and Title Guarantee and Trust Company, as mortgagee of record is hereby authorized and directed to execute with Marine Harbor Properties, Inc., the owner, an extension agreement in the form submitted to the Court at the time of the hearing of the plan referred to, received in evidence and marked as one of the Superintendent's exhibits and filed in the office of the Clerk
161 of the County of Kings, with such modifications as may be necessary to conform with any amendments approved by the Court; and it is further

ORDERED, that any and all documents necessary or convenient in the consummation of said plan of readjustment be executed.

Enter,

GEO. E. BROWER
J. S. C.

Granted
162 Dec. 5, 1934

JOHN N. HARMAN
Clerk

County Clerk's Index
No. 14668, 1933

SUPREME COURT
COUNTY OF KINGS.

IN THE MATTER
of the
Application of the PEOPLE OF THE STATE OF NEW YORK, by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property of and rehabilitate the
BOND AND MORTGAGE GUARANTEE COMPANY.

COPY

In the Matter of a Plan of Readjustment, etc., of a Mortgage Covering Premises:
351 to 363 Marine Avenue, Brooklyn, New York
Guarantee No. 181,568
Final Order 270

HUGHES, SCHURMAN & DWIGHT,
Attorneys for George S. Van Schaick, Superintendent of Insurance of the State of New York as Rehabilitator of Bond and Mortgage Guarantee Company,
Office and Post Office Address:
100 Broadway,
Borough of Manhattan,
New York City.

Due and timely service of a copy of the within is hereby admitted this .... day of ....., 193...

Sir:

PLEASE TAKE NOTICE that an order of which the within is a copy, was entered herein in the office of the Clerk of the County of Kings on the 6 day of Dec., 1934.

Dated, Dec. 6, 1934.

Yours, etc.,

HUGHES, SCHURMAN & DWIGHT,
Attorneys for George S. Van Schaick, Superintendent of Insurance of the State of New York as Rehabilitator of Bond and Mortgage Guarantee Company,
Office and Post Office Address:
100 Broadway,
Borough of Manhattan,
New York City.

To:

Notice of Entry to:

C. ELMER SPEDICK, Esq.
Attorney for Title Guarantee and Trust Company
26 Court Street
Brooklyn, N. Y.

Marine Harbor Properties, Inc.,
1441 Broadway,
New York, N. Y.

Owner.

COPY RECEIVED
DEC 8 1934
C. ELMER SPEDICK

Attorney for.....

166 EXHIBIT K, ANNEXED TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER *of* MARINE HARBOR PROPERTIES, INC., *Debtor.*	AFFIDAVIT PLAN NO. 270 BMC 181568

167 STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOSEPH L. LONG, being duly sworn, deposes and says:

I reside at 1426 East 15th Street, Borough of Brooklyn, New York. I am now, and for more than five years have been, employed as a real estate appraiser by The Mortgage Corporation of New York. I have been engaged in the business of appraising real estate in New York City and the metropolitan area for more than twenty years and have qualified as an expert with respect thereto in many judicial proceedings. My opinion has also been used on numerous occasions
168 as the basis for making loans upon, and sales of real estate in this locality.

On March 15th, 1940, I personally inspected and appraised premises located at the Northwest corner of Marine and Fourth Avenues, in the Borough of Brooklyn, County of Kings, City and State of New York, also known as 351-363 Marine Avenue. The property consists of a plot of ground 214 feet by 114.5½ feet, irregular, improved by a six story and cellar brick elevator apartment building containing 309 rooms, subdivided into 103 apartments, and three stores; and was erected in 1930. The building is equipped with a steam heating plant, which also supplies hot water. The building

169

contains two Seaberg self-service elevators, two incinerators and has two iron stairways. The lobby and hall floors are of terrazzo and the baths have colored tile walls 4 feet 6 inches high and tile flooring. The rooms have 7/8 inch parquet oak flooring throughout with the exception of the kitchens.

I am of the opinion that as of March 15th, 1940, the property had a fair value of $350,000.00 of which $65,000.00 was applicable to the land and $285,000.00 to the building and improvements thereon. The property was assessed in 1941-42 for $380,000.00 of which $90,000.00 was applicable to the land and the balance thereof to the building and improvements thereon.

170

JOSEPH L. LONG

Sworn to before me this
25 day of Sept. 1941.

Signed) SAMUEL E. ZALOUM
Notary Public, Kings Co.
N. Y. Co. Clerk's No. 27
N. Y. Co. Reg. 3-Z-19
Commission expires March 30, 1943.

171

172

Affidavit of Curtiss Ely Frank

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

173

CURTISS ELY FRANK, being duly sworn, deposes and says:

I am a member of the firm of Hughes, Hubbard & Ewing, attorneys for The Mortgage Corporation of New York, Trustee of the first mortgage in the above entitled matter. I make this affidavit in support of an application by such Trustee to dismiss the proceeding under Chapter X of the Bankruptcy Act.

I have been in charge of this mortgage trust for some time and have had frequent dealings with the president of the debtor corporation. He has on several occasions during
174 the foreclosure receivership promised that he would make definite arrangements to clear up the arrears and vacate the receivership if certain delays in the receivership proceedings were granted. First, he wished delay on a motion authorizing the receiver to make certain necessary repairs. He failed to keep his promises and the order was eventually entered. Thereafter he requested further delay and a minimizing of expense, stating to me that the money had been raised and that he would be here at three o'clock on a Monday afternoon with the money to close up the entire matter. He failed to appear. Several days later he called and apologized and said that he would be in at a subsequent date.

Again, he failed to appear. Thereafter I investigated and was informed by my associates and by employees of The Mortgage Corporation of New York that he had been thoroughly unreliable throughout.

CURTISS ELY FRANK.

Sworn to before me this
29th day of September, 1941.

MARGARET ELEANOR WALLING
Notary Public 176
N. Y. Co. Clk's No. 30, Reg. No. 2 W 38
Kings Co. Clk's No. 98, Reg. No. 2010
Bronx Co. Clk's No. 5, Reg. No. 8 W 42
Commission Expires March 30, 1942

[NOTARIAL SEAL]

177

178

Affidavit of Joseph L. Long

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

179 JOSEPH L. LONG being duly sworn, deposes and says:

I make this affidavit supplementing my affidavit sworn to September 25, 1941 and attached as Exhibit K to the petition in support of the application to dismiss this proceeding under Chapter X of the Federal Bankruptcy Act. I personally inspected and appraised the premises in question today, September 29, 1941. In my opinion the fair value of the property today is the same as it was on March 15, 1940, when I made my last previous appraisal, to wit, $350,000.00.

JOSEPH L. LONG

180 Sworn to before me this
29th day of September, 1941.

MARGARET ELEANOR WALLING
Notary Public
N. Y. Co. Clk's No. 30, Reg. No. 2 W 38
Kings Co. Clk's No. 98, Reg. No. 2010
Bronx Co. Clk's No. 5, Reg. No. 8 W 42
Commission Expires March 30, 1942

[NOTARIAL SEAL]

Affidavit of Gussie Hammer 181

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

GUSSIE HAMMER, being duly sworn, deposes and says: 182

I am the president of the debtor herein, and the owner of all of its issued and outstanding stock.

I have read the petition of the Mortgage Corporation of New York. This affidavit is made for the purpose of opposing the granting of the relief as therein prayed for.

DISCUSSION OF PETITION

This petition is very bulky, and, in appearance, formidable. Stripped of its exhibits, however, and boiled down to its essence, it recites but one fact, namely—that in Kings County this petitioner instituted an action against the debtor to foreclose a mortgage, and that such action is still pending, 183 for which reason this court should undo its own order and dismiss this proceeding.

The petition itself contains only seven (7) paragraphs, most of which sounds like a history-book. Paragraphs 1, 2, 3, 4 and 5 relate the past history of the debtor and of the petitioner's relation to it. None of it is new, because it was set forth in the original petition filed by the debtor. This new petition merely repeats and reiterates, in broader form perhaps, and with considerably more detail, all of the allegations contained in my affidavit and the debtor's original petition, upon which two instruments, this proceeding was instituted. Thus although nothing controversial has been

184 *Affidavit of Gussie Hammer*

inserted in these five (5) paragraphs, neither has there been discovered anything new or unknown.

In paragraph 6, however, various new facts, under the title of

"Negotiations for the further reorganization of the mortgage"

are recited. None of these new facts have been heretofore related to this Court. That it was unnecessary to relate "negotiations" is obvious on its face. However, if "negotia-
185 tions" are to be disclosed, then by all means let's have all of them. This, I propose to do later on in this affidavit.

Paragraph 7 adds additional facts, not presently known to this Court, the importance or relationship of which to this proceeding is very doubtful. All that paragraph 7 does is point out that the debtor is in financial distress. I do not dispute this.

This is the petition upon which the Mortgage Corporation of New York seeks to have this Court invalidate this proceeding on the ground that the debtor's petition was not filed in good faith.

NEW FACTS

186 First: Before this proceeding, and even the foreclosure proceeding was instituted, the debtor made every attempt to reorganize its relationship with the certificate holders. Every attempt to do so, however, was severely rebuffed by this very petitioner. Every offer of settlement was brusquely rejected. I sincerely believe that if I could take my proposition to the certificate holders directly, a workable plan, satisfactory to all parties could be obtained. But this opportunity has been denied to me by this very petitioner who has refused any bit of information regarding the certificate holders, except to say that my propositions were unacceptable. An idea can be obtained of the nature of the treatment the debtor received from the petition itself

which speaks of debtor's various offers being "turned down". Everything offered was "turned down", summarily, brusquely, severely and without recourse.

Second: Petitioner speaks of an offer made by the debtor which the petitioner "turned down". The petitioner does not know, nor could it know, that even if the offer had been accepted, the debtor would have been compelled to withdraw it. The offer, when made, contemplated the introduction of new capital funds into the debtor. Counsel for the debtor, when the matter was discussed with them and its aspects analysed, advised us against it, because within a few 188
weeks, the debtor would find itself back in the same situation with identical difficulties. It was therefore compelled to withdraw the offer, but in view of its earlier rejection by this petitioner, the withdrawal became unnecessary.

This situation is well known to the petitioner who, in its own petition, states that on October 1, 1941, approximately $15,000.00 in additional liabilities will accrue against the debtor, and—there are no funds to meet it.

Third: I have been informed, and I do sincerely believe, that the actual cash-realizable-value of the debtor's property is substantially less than its value even as conceded by the petitioner. Some idea can be gleaned of this value from the 189
fact, (and I am informed that it is the actual fact) that the market value of the certificates is approximately 50% of par.

The debtor's plans of reorganization, as they are being presently worked out, contemplate payment to the certificate holders of 100% of their claims.

Fourth: There are junior lienors who have claims against the debtor, as well as its property. Their names, and the nature of their claims, is more particularly set forth in the petition. However, their existence has been ignored and totally disregarded by this very petitioner, not only in this petition, but in the foreclosure proceedings instituted by it.

To treat with these junior lienors, whose claims against the debtor are of equal validity as the certificate holders,

190 excepting for the security thereof; is the intention of the debtor The court will please rely upon this representation as a statement of absolute truth. In the foreclosure proceedings, even if properly begun, treatment with these junior lienors could not be had. Nowheres, except in this Court, and in a proceeding such as this,—could such dealings and treatment be had.

DEBTOR'S INTENTIONS

This proceeding has been commenced for the sole purpose of effectuating a plan of reorganization with all creditors, 191 in the only court where same is possible. The plan will be founded upon the introduction of new and additional capital funds into the debtor. This, I respectfully submit, is the utmost of good faith, in fact, its actual definition and the essence of its meaning, as Congress must have intended it when enacting the Bankruptcy Act.

I sincerely believe that I can effectuate such a plan, provided that the rights afforded to me by law are fully protected. This petitioner, if it be permitted to go through with its intentions, will succeed in denying those rights to the debtor. In this Court, where I can deal directly with the owners of the certificates, I am sure some plan,—fair, equitable and feasible,—will be worked out and ratified. For 192 the certificate holders, in the last analysis are the real and actual creditors, the ones who must ultimately and finally pass upon any proposed plan. For this opportunity, I earnestly pray this Court.

GUSSIE HAMMER

Sworn to before me this
29th day of September, 1941.
SOL FRIEDLAND
Comm. of Deeds
N. Y. City
Exp 2/4/43

193

Affidavit of Samuel Silverman

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SOUTHERN DISTRICT OF NEW YORK
STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK

194

SAMUEL SILVERMAN, being duly sworn, deposes and says:

I am one of the Trustees of the Debtor heretofore appointed by this Court, by its Order of September 17th, 1941, wherein it approved the Debtor's petition for relief pursuant to the provisions of Chapter X of the Bankruptcy Act (hereinafter referred to as the Chandler Act), and assumed jurisdiction over the Debtor and its property. My appointment as such Trustee was made on the Debtor's petition that I be appointed as an additional Trustee, as provided for in Section 156 of said Chandler Act, having heretofore been associated with the Debtor as its Vice President and General Counsel.

195

The Debtor's petition herein was filed with my full approval. The decision so to invoke the jurisdiction of this Court was arrived at only after a careful analysis of the Debtor's structure and financial problems, and was the result of a firm conviction that only by availing itself of the beneficent provisions of the aforesaid Chandler Act, could the Debtor obtain adequate relief for itself, and a definitive solution and liquidation of its creditors'—(both secured and unsecured)—interests.

Viewing the problem from the vantage point of retrospect and in the light of what is affirmatively alleged in the instant

moving petition of the MORTGAGE CORPORATION OF NEW YORK, the first Mortgage Indenture Trustee, but confirms my prior conclusions that it is only in this Forum, and under the all comprehensive scope and basic philosophy of the aforesaid Chandler Act, that complete equity and practical justice could be achieved in the adjustment of the Debtor's interest *vis a vis* its unsecured creditors and the respective classes of its security holders and lienors.

In the hope that I might be of assistance to the Court in its determination of the instant application, I respectfully submit this affidavit and accompanying Memorandum of Law,
197 not as a partisan advocate of a limited interest, but as a Trustee and officer of this Court, with all the conscious objectivity and detachment which the Court's designee should at all times observe in the discharge of the trust reposed.

Towards the close of August, 1941, I was advised by Mr. & Mrs. Hammer, my fellow officers in the Debtor Corporation, that they had succeeded in procuring additional financing in a sum approximately $7,500, which sum, added to the net balance remaining in the hands of Mr. Rubenstein, the Receiver in foreclosure, after payment of the Receiver's and his Counsel's fees, would enable the Debtor to cure the defaults constituting the basis of the foreclosure proceedings,
198 and thus procure a discontinuance thereof.

I pointed out that their plan was but a stop-gap, and did not touch the heart of the problem; that in October, 1941, an additional $15,000 would accrue and become payable as and for interest on the first mortgage and current real estate taxes, which sum, I knew, they would be unable to obtain, thereby precipitating again another foreclosure of the first mortgage; that the first mortgage affecting the premises was more than six times the annual rental reserved or actually received, whereas the normal first mortgage affecting premises such as the property of the Debtor, at this time, does not exceed three to three and a half times the

annual rental reserved; that no provisions were being made either for the junior lienors or for unsecured creditors, and that the vicious cycle of an overburdened and topheavy financial structure, and the feverishly frantic efforts to forestall and stave off disaster would continue, with an inevitable and unavoidable collapse as the ultimate certainty; that unless a fundamental revision of the Debtor's capital structure could be achieved, with the consent of all creditors, secured and unsecured, either by immediate satisfaction on the basis of actual rather than formal value, or a long range plan of equitable liquidation, it was utterly impossible ever to see the end of the road. 200

We then considered the practical possibilities of such a workable plan of reorganization as well as the best methods and avenues of accomplishing such desired end. It became clear at once, and I so advised my client, that no adequate relief could be obtained by any known proceedings, equity or otherwise, in our State Courts.

In the first place, the Schackno Act, under which the Supreme Court of New York assumed jurisdiction over the first mortgage affecting Debtor's property, only related to supervision over and reorganization of certificated first mortgage issues, and properties of Mortgage Corporations or institutions in process of reorganization. It had no relation to and concerned itself little, if any, with the problem of junior lienors, and the equities between such different classes of security holders, the problem of unsecured creditors, or that of the owner of the property itself. 201

Secondly, our experience in broaching the subject of reorganization of the first mortgage indicated that no possible solution could be obtained by resort to the State Court. The Mortgage Corporation, Indenture Trustee, interposed itself as a non-conductor preventing direct contact between the debtor and the certificate holders who are the real parties in interest, so far as the reorganization of this first mortgage

is concerned. I pointed out to my client that this property was then entering its second decade of existence, a period during which, according to universal experience, there was not only an increased operating and maintenance cost, but also increased capital replacement requirements; that the insistence of the Mortgage Corporation upon the use of the entire income of the property for payment of interest on the first mortgage and a nominal amortization, without providing for any reserve of any part thereof, either in the form of return upon the Debtor's investment or for the partial satisfaction of junior liens, and without providing for a
203 reserve to meet the increased cost of operation and the probable capital replacement needs, as a condition precedent to its entertaining a plan or reorganization for the submission to the Certificate Holders for their decision, rendered futile any plan or any idea of obtaining practical results from that medium.

I therefore advised recourse to this Court under the provisions of the Chandler Act, where complete relief could be obtained and a workable plan evolved as the only method of solution of the Debtor's quandary. We considered possible plans for ultimate submission to the Court, and, through the Court, to all creditors. I was assured by my client, and an independent investigation convinces me that their assurances
204 were not a figment of imagination, that if the creditors desire liquidation of their claims on the basis of present actual values rather than on the face amount of their claims, such results could be achieved by refinancing the first mortgage on the property and placing thereon a new institutional first mortgage, and the addition of about $50,000 in cash. The sum which, we felt, we would realize from such a plan would be sufficient to pay certificate holders of the first mortgage alone a sum in excess of that which would be realized by their sale of their certificate in the open market, or that which they would realize by retaining their lien on the property

with its increasing depreciation, as well as take care of the other creditors. On the other hand, if the creditors preferred gradual liquidation of their claims in the full amount, a long range plan was feasible whereby the interest rate was to be reduced substantially and increased amortization made on account of such creditors' claims.

I know that the petition of the debtor was filed in good faith and not for delay, with the hope of evolving a reorganization plan deemed equitable by the Court and acceptable in fact to all of the creditors. As a Trustee, I am satisfied, and I express it as my opinion, that such a plan would in the long run even be more beneficial to the certificate holders of the first mortgage themselves, and would be the only means whereby the other creditors of the Debtor, junior lienors and unsecured creditors, as well as the Debtor itself would obtain some measure of relief. 206

SAMUEL SILVERMAN

Sworn to before me this
29th day of September, 1941.

BEATRICE U. KANE
Notary Public, Bronx County
Bronx County Clerk's No. 153
New York County Clerk's No. 607
Commission Expires March 30, 1943 207

208 **Opinion of District Court**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

BRIGHT, *D. J.*

HUGHES, HUBBARD & EWING, ESQS.,
By CURTISS ELY FRANK and ORVILLE H. SCHELL, JR., ESQS., Of Counsel, Attorneys for The Mortgage Corpo-
209 ration of New York,
1 Wall Street, New York City.

FRIEDLAND & FRIEDLAND, ESQS.,
By ARTHUR E. FRIEDLAND, ESQ., Of Counsel, Attorney for Debtor,
291 Broadway, New York City.

GEORGE ROSLING, ESQ.,
Attorney for Mortimer Rubenstein as Receiver.

SAMUEL SILVERMAN and MAURICE RUBINGER, ESQS.,
Trustees, In person.

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210 This is an application by The Mortgage Corporation of New York as trustee, to vacate an order made herein on September 17th, 1941 approving the petition of the above named debtor, filed for reorganization under Chapter X of the Bankruptcy Act (Title 11 U. S. C. A. Sections 501-672), under which trustees have been appointed and qualified, and to dismiss such petition. The ground of attack mainly is that the petition for reorganization was not made in good faith.

It appears without dispute that the secured indebtedness of the debtor consists of a first mortgage held by The Mortgage Corporation, amounting, with defaults as of October

1st 1941, to $399,814, of a second mortgage of $25,000, of a third and fourth mortgage upon each of which there is due not more than $2,000, and conditional sales contracts aggregating about $3,000, a total of $431,814; and there is unsecured indebtedness, the amount of which is not disclosed. The value of the real estate concededly does not exceed $350,000, it being assessed at $380,000.

The first mortgage was originally given to the Title Guarantee & Trust Company, and certificates were issued under it to about ninety holders, which certificates were guaranteed by the Bond & Mortgage Guaranty Company. The latter company becoming insolvent, its affairs were taken over by 212
the New York Superintendent of Insurance, and the mortgage in question was reorganized under the New York Schackno Act, the plan being approved by the New York Supreme Court in Kings County, on November 24th 1934, and declared final on December 6th 1934, after approval by two-thirds in amount of the certificate holders. Under that plan, the mortgage was extended for three years to December 1st 1937, with interest at 6% to December 1st 1934, and thereafter at 5% to maturity.

Subsequently, The Mortgage Corporation was appointed, and is now acting as trustee pursuant to an order of the State Court, made December 6th 1938, which order further pro- 213
vided that the court should retain jurisdiction of the proceeding until the complete liquidation of the trust estate.

The first mortgage was not paid at its maturity, and on April 1st 1941, the debtor defaulted in the payment of interest and taxes; on May 1st, 1941, foreclosure proceedings were begun in the State Court, and are now pending, in which action a receiver was appointed, who took possession of the property, and has since been collecting the rents therefrom and operating the same.

Negotiations for a further modification of the mortgage attempted on two occasions by the debtor, in which further extension of payment and reduction in interest were sought,

214 *Opinion of District Court*

were unsuccessful, The Mortgage Corporation declining each after submitting the same only to its Trust Committee. No submission of the proposed modification was made either to the court or to the certificate holders. The receiver estimates that the property is capable of earning approximately 6⅔% upon the first mortgage, and upon the argument, it was stated by his attorney that there was but one vacancy in the premises.

In opposition to the application, it is shown that the market in New York City for certificates issued under the first mortgage in question, is, at present, 50% of par; and
215 it is contended that the reorganization in the State Court can only affect the certificate holders under the first mortgage, and cannot take into consideration the subsequent liens, as well as the unsecured creditors.

The decline in the value of the real property, the fact that the value of the certificates in the market is so much less than par, and the power of this court in any attempt to reorganize to consider the rights of all lienors and creditors, as seems to be the purpose of the Chapter X of the Bankruptcy Act, convinces me that the application now made should be denied, and to require a finding that the original petition was filed in good faith. Certainly, the object of the
216 Chapter is to make a fair and equitable application of the assets of the debtor, which cannot meet its obligations by payment in full as they mature, to an adjustment of its debts. Such an object cannot be attained in the State Court proceeding. It may be here. What plan may be presented cannot now be definitely ascertained. The Chapter contemplates an opportunity on the part of the trustees in reorganization to present one, and certainly does not contemplate a reorganization for the sole benefit of any particular creditor, secured or otherwise. It does not provide for a dismissal of such proceeding because a single creditor opposes it, nor because such creditor contends that no plan can be presented.

If the first mortgage creditor is to be given a free hand, it is obvious, in view of the present depreciated value of the real estate, that not only will all creditors be wiped out, but also that the certificate holders will receive only a fraction of their investment. Can those certificate holders fare any better after a forced sale of the real estate than in this proceeding? There seems to be no question but that the debtor should be reorganized. The question is whether that should proceed in this court, where all creditors may be heard, or in the State Court, which has control over but one class of creditors. I do not think the time has yet arrived to 218
decide that question, nor can it arrive until an opportunity has been given to learn what kind of a plan can be presented. At present but one creditor is being considered, and its foreclosure has been pending for four months without any apparent progress being made.

Four cases in this district seem to have marked out the bounds within which this application may be considered. In Brooklyn Trust Co. v. Rembaugh, 110 F. 2d 838, the Circuit Court of Appeals for the Second Circuit, reversed an order denying an application similar to this where the facts were almost parallel. No doubt was there found as to the jurisdiction of the District Court, nor, it was written, any substantial ground for attacking the exercise by the trial 219
judge of discretion in approving the petition as filed in good faith within the broad meaning of that term. But it was there held that the debtor, after assenting to the plan in the State Court, could not escape from the consequences of the plan simply by filing a petition for reorganization in the Federal Court, while proceedings in the State Court were still pending. The distinction between that case and this, it seems to me, is that here the debtor has endeavored on two occasions to present modified plans for relief, but on each occasion, has been rebuffed by the trustee, and has had no opportunity to make application for the relief which obviously the situation requires. The Act, I think, contemplates

the right on the part of the debtor to go to the certificate holders direct, for otherwise, I cannot see the reason for Section 565 of Title 11 U. S. C. A.

In Castle Beach Apartments, 113 F. 2d 762, an order denying a motion similar to this was affirmed, and the facts there were quite similar, except that the debtor there had not been a party to any reorganization plan in the State Court; but citing Brooklyn Trust Co. v. Rembaugh, supra, it was held that if it had that alone would not have been adequate ground for a dismissal of the petition. The fact that 75% of the certificate holders indicated in that case
221 that they would not approve any plan was no proof that such an expression of disfavor was obtained with the consent of the court pursuant to law. I think the inference is that those most interested should have the right to say whether or not the plan to be proposed would be satisfactory. It was further stated that there was no sufficient reason because the debtor might be shown to be insolvent, for deciding that the District Judge did not exercise sound discretion in approving the petition and refusing to dismiss; that it could not be said that the attempt to reorganize was so hopeless that good faith was absent.

In Blinrig Realty Corp., 114 F. 2d 100, the order ap-
222 proving the petition filed under Chapter X was reversed. It was there said that good faith in the sense of a fair likelihood of success, in view of the vain efforts to reorganize already made in the State Court, were needed to be shown prima facie at least in order to entitle the petition to approval. The efforts made by the debtor there were obviously unfruitful, so much so, that the court concluded that there was no reasonable ground for believing that the debtor's creditors would agree to a plan with less favorable terms, or that the debtor could do any better in the proceeding under the Federal Act, than it had in the State Court.

There has obviously been no fair effort here to determine any such a thing. Each suggestion made by the debtor

has gone no further than the Trust Committee of The Mortgage Corporation. What the creditors might do, particularly in view of the fact that certificates are selling at one-half their face value, and that the property is worth less in the market than the first mortgage, is most problematical. Consideration should be given to the possibility that new money may enter the picture, which prospect can be probed by any plan which the trustees may propose.

And, lastly, In re 263 West 38th Street Corporation, 37 F. Supp. 667, an order for reorganization was approved by Judge Hulbert in an opinion in which the foregoing cases were cited and discussed, and in which he wrote that no 224
indication having been given with respect to the contemplated terms of reorganization, whether a plan could be prepared and submitted which would be fair, feasible and equitable, could best be determined after a hearing.

I think that under all the circumstances shown here, the trustees should be given an opportunity to submit such a plan, and that the application of The Mortgage Corporation should be denied. (In re Mt. Forest Fur Farms, 103 F. 2d, 69; cert. denied 308 U. S. 583.)

Upon the argument, the receiver's counsel requested that if the application were denied, he be permitted to retain some amount of money as a possible backlog against the 225
payment of his commissions and his attorneys' fees. I do not think that is necessary. The order to be entered upon this motion can provide that the turning over by him of such moneys which he has in his possession, and his subsequent accounting, shall be without prejudice to his application for commissions and attorneys' fees.

Application denied. Settle order on notice.

Dated: N. Y. September 30th 1941.

(sgd) JOHN BRIGHT
U. S. D. J.

226 **Petition of Marine Harbor Properties, Inc.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To the Honorable Justices of the District Court of the United States, for the Southern District of New York:

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The petition of Marine Harbor Properties, Inc., hereinafter referred to as the "debtor", pursuant to Chapter X of "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved June 22, 1938, and acts amendatory thereof, respectfully alleges:

1. The debtor herein is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is not a municipal, railroad, insurance, or banking corporation, or a building and loan association.

2. The debtor's principal place of business is c/o Olesker, 228 570 Seventh Avenue, in the Borough of Manhattan, City and State of New York, and during the six months immediately preceding the filing of this petition, and prior thereto, the debtor had, and now has, its principal place of business in the Southern District of New York.

3. The debtor is engaged in the business of owning and operating real estate and has been so engaged since its organization on February 10, 1933.

It is now the owner of a parcel of real property situated in the County of Kings, State of New York, and being described as follows:

All that lot or parcel of land, with the buildings and improvements thereon, in the Borough of Brooklyn, County of Kings, City and State of New York, bounded as follows:

BEGINNING at the corner formed by the intersection of the Northeasterly side of Marine Avenue and the northwesterly side of Fourth Avenue (100 ft. wide) running thence northeasterly along the northwesterly side of Fourth Ave., (100 ft. wide) one-hundred and fourteen feet and five and one-half (114-5½") inches, thence northeasterly parallel with Marine Avenue, 230
139 ft.; thence northeasterly parallel with Fourth Avenue, 7 ft. 6½", thence northwesterly with Marine Avenue, 75 ft.; thence southwesterly and at right angles to Marine Avenue, 122 ft. to the northeasterly side of Marine Ave., thence southeasterly along the northeasterly side of Marine Avenue, 214 ft. to the point or place of beginning, said premises being known as 351 Marine Avenue.

4. The aforesaid property, owned by the debtor, is subject to four open mortgages.

(a) One of the said mortgages was made by Marine Building Corp. to secure the payment of the principal sum 231
of $370,000 to Title Guarantee & Trust Co. with interest thereon. Said mortgage was dated on or about April 28, 1931, and was recorded on April 28, 1931, in the Office of the Register of the County of Kings, in liber 7634 of Mortgages, at Page 128.

The property aforesaid, originally owned by Marine Building Corp. was by deed, (recorded in the Office of the Register of the County of Kings, on September 10, 1931,) conveyed to Marine Holding Corp., which corporation in turn, by deed (recorded in the Office of the Register of the

232 *Petition of Marine Harbor Properties, Inc.*

County of Kings on February 20, 1933), conveyed the aforesaid property to petitioner. All of the aforesaid conveyances were made subject to the original mortgage given to the Title Guarantee & Trust Co.

Title Guarantee & Trust Co. issued certificates of participation against said mortgage, constituting assignments of parts of the said mortgage, and these were issued to approximately 90 persons, all hereinafter referred to as the certificate holders. Bond & Mortgage Guarantee Co. guaranteed the payment of the interest on and the principal of said certificates to the certificate holders.

233 The aforesaid mortgage in the sum of $370,000 was modified by agreement between petitioner and Title Guarantee & Trust Co. on March 11, 1935. Said agreement provided that the date of the payment of the principal sum of $370,000 be extended to December 1, 1937, upon condition that petitioner pay interest at 5% per annum, beginning April 1, 1935, and semi-annually thereafter; this extension agreement was made pursuant to an order of the Supreme Court of the State of New York, County of Kings, dated December 6, 1934.

Bond & Mortgage Co., aforesaid, having become insolvent, a proceeding was instituted for a readjustment of the rights
234 of the certificate holders under Chapter 746 of the Laws of 1933, as amended, in the Supreme Court of the State of New York, County of Kings, and a final order was entered therein, on the 6th day of December, 1938, appointing the Mortgage Corporation of New York, trustee of the said issue, and the said Mortgage Corporation of New York, since the making and entry of the aforesaid order, has been acting as such trustee.

All of the terms and conditions of the said bond and mortgage, as modified by the aforesaid extension agreement, have been fully complied with except:

1. That the principal of the said mortgage, which became due on December 1, 1937, under the terms of the said extension agreement, has not been paid.

2. That the interest due on said mortgage on April 1, 1941, has not been paid.

3. Taxes due the City of New York, on April 1, 1941, on the assessed valuation of said property have not been fully paid.

236 The debtor is not liable upon the bond, secured by the mortgage hereinbefore referred to.

(b) The second mortgage, also encumbering the property of the debtor, is owned by Friedwald Mortgage Corp. of 7321 Fifth Avenue, Brooklyn, New York. Said mortgage was recorded on December 10, 1930, in the Office of the Register of the County of Kings, in liber 7350, page 334 of Mortgages. It was made to secure the payment of the principal sum of $82,750, and when originally made, it was a first lien on the aforesaid property. However, by agreement dated May 1, 1931, the aforesaid mortgage was subordinated to the mortgage in the sum of $370,000 hereinbefore more 237 particularly described, and presently remains a second lien on the property herein. The balance due on this mortgage is $25,000.00.

(c) In addition to the foregoing mortgages, there is a third mortgage made to Max Olesker and Morris Aronson, in the principal sum of $8,724.07, recorded on November 2, 1938, in the Office of the Register of the County of Kings, in Liber 8286, Page 530 of Mortgages. There is a dispute as to the principal amount now due on said mortgage, but same does not exceed the sum of $2,000.00.

238 *Petition of Marine Harbor Properties, Inc.*

(d) In addition, there is a fourth mortgage made to Joseph Schwartz, recorded on November 4, 1940, in the office of the Register of the County of Kings in Liber 8617, Page 6, made to secure payment of the principal amount of $8,480.60. There is a dispute between the debtor and the mortgages as to the principal amount now due, but same does not exceed $2,000.00.

(e) The property owned by the debtor is also subject to various other mortgages of record, all of which have been paid, and for which satisfaction pieces are in the possession
239 of petitioner or its representatives. None of these mortgages, however, have been discharged as of record in the Office of the Register of the County of Kings, because of failure of funds to accomplish same.

(f) The property owned by the debtor is also subject to various conditional bills of sale affecting refrigeration fixtures installed in the premises of the debtor. The balance due on the purchase price thereof is approximately $3,000.00, and the conditional bills of sale remain unsatisfied because thereof. In all cases, the conditional vender is the Kings Appliance Corp.

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5. That there are no proceedings pending against the debtor or affecting its property excepting that commenced by the Mortgage Corporation of New York, on or about the 3rd day of May, 1941. This proceeding was commenced for the purpose of foreclosing the first mortgage hereinbefore more particularly described. Said proceeding is presently pending in the Supreme Court of the State of New York, County of Kings, and is entitled as follows:

THE MORTGAGE CORPORATION OF NEW YORK, as Trustee under a declaration of trust, dated December 12, 1938, executed pursuant to a plan of readjustment, etc., of the rights of the holders of investments in a certain mortgage covering premises 351 to 363 Marine Ave., Borough of Brooklyn, County of Kings, City and State of New York, guaranteed by Bond & Mortgage Guarantee Company, Guarantee No. 181,368, approved by a final order of the Supreme Court of the State of New York, for the county of Kings, entered the 6th day of December, 1938, and for the benefit of the holders of investments in said mortgage, 242

Plaintiff,

against

MARINE HARBOR PROPERTIES, INC. MARINE BUILDING CORPORATION, LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of Bond and Mortgage Guarantee Company, and as successor to Mortgage Commission of the State of New York, as successor to and assignee of certain liens of Mortgage Commission of the State of New York, and THE PEOPLE OF THE STATE OF NEW YORK, 243

Defendant.

6. That simultaneously with the commencement of, and in, the aforesaid proceeding Mortimer Rubenstein, was duly appointed receiver by the Supreme Court of the State of New York, County of Kings. He immediately entered into possession of the premises owned by the debtor and is presently acting as receiver of its property.

244 *Petition of Marine Harbor Properties, Inc.*

7. The assets, liabilities, capital stock and financial condition of the debtor, as of September 15, 1941, are as follows:

ASSETS: The debtor has no cash and no assets other than the property above referred to, and now in the possession of Mortimer Rubenstein, as receiver. The income from the property above referred to, is likewise in the hands of the said Mortimer Rubenstein, as receiver. Such income is sufficient to meet the interest on the mortgages affecting petitioner's property, or allocable to it, but it is insufficient to
245 enable it to pay the principal amount of said mortgage.

LIABILITIES: The debtor owes approximately the following amounts:

(a) $370,000 principal due on the first mortgage above described, with accummulated interest thereon.

(b) $25,000 on the second mortgage above described.

(c) A sum, not in excess of $2,000, due on the third mortgage, above described.

(d) A sum, not in excess of $2,000, due on the
246 fourth mortgage, above described.

(e) $3,000 balance due for refrigeration assets purchased on conditional bills of sale.

(f) and is indebted to its counsel for legal services rendered and to be rendered in connection with this and other proceedings, looking to the reorganization of the debtor.

(g) Such amounts as may be due the State of New York, for possible franchise taxes as well as any other taxes.

(h) Unknown amount due unsecured creditors, for current expenses incurred just previous to the institution of the foreclosure proceedings above described. The exact names, addresses and amounts of claims of said creditors are unknown to petitioner.

That, upon information and belief, none of the unsecured creditors of the debtor, excepting the State of New York, and Friedland & Friedland, Esqs., holds a claim in excess of 5% of the total of all claims.

That there are no secured creditors of the debtor other than the holders of the securities above set forth. 248

CAPITAL STOCK: The capital stock of the debtor consists of 100 shares each of the par value of $100.00, all common stock, and all of which is issued and outstanding.

FINANCIAL CONDITION OF THE DEBTOR: The financial condition of the debtor is as hereinbefore set forth.

8. The debtor is unable to meet his debts as they mature and desires to effect a plan of reorganization pursuant to Chapter X of the Chandler Act. Its liabilities exceed in amount $250,000. 249

9. That there is pending no plan of re-organization, readjustment, or liquidation affecting the property of the debtor, either in connection with, or without, any judicial proceeding.

10. A plan for the re-organization of the debtor is now being formulated. It will provide for a revamping of the debtor's corporate structure and of its secured indebtedness. Adequate relief under Chapter XI cannot be obtained, because Chapter XI affects only unsecured indebtedness.

11. The debtor presently situated, is unable to secure additional capital, but has received assurances that, if a satisfactory re-organization is consummated under Chapter X and as part thereof, additional capital funds will be made available.

12. The filing of this petition by the debtor has been duly authorized by resolutions of the Board of Directors adopted at a meeting thereof, held on September 10, 1941, as shown by the certificate of the debtor marked Schedule "A", and made a part hereof.

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13. The purpose of this proceeding is to procure a readjustment of the corporate structure, and all its secured indebtedness, so as to extend the time of payment of said secured indebtedness, upon such terms as will enable the debtor to pay a reasonable amount annually in reduction of the principal thereof in accordance with the provisions of a plan of re-organization to be presented to this Court.

14. That no previous application, by or in behalf of the debtor has been made to this Court or any other Court for the relief as prayed for herein.

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Wherefore, the debtor prays that this Court enter an order granting the following relief:

(1) Finding that this petition complies with, and is properly filed under, Chapter X of the Bankruptcy Act.

(2) That the debtor is unable to meet its debts as they mature.

(3) That said petition has been filed in good faith.

(4) Appointing a trustee to take possession of the property and assets of the debtor.

(5) Appointing SAMUEL SILVERMAN, a director of the debtor and an officer thereof, to wit: Vice-President, as an additional trustee, in accordance with Section 156 of the Bankruptcy Act.

(6) Enjoining and restraining the debtor, its stockholders, directors, officers, superintendents, managers, attorneys, agents, employees, and creditors, their agents and employees, and all other persons, firms or corporations, including Sheriffs, Marshals or other officers, agents, attorneys, representatives, servants or employees, whether same are creditors or 254
claiming to be creditors, or having or claiming to have any right, title and interest in and to the property of the debtor, from interfering with, transferring, selling, or disposing of, any of the property or income constituting the debtor's estate and from the commencement or continuing of any suit or suits against the debtor until a final decree in this proceeding has been made and from levying any attachment, execution or other process upon or against any of the properties constituting the debtor's estate and from doing any act whatsoever to interfere with the possession, operation, or management by the trustees, of the property, and business constituting the debtor's estate, or 255
interfering in any way with the trustees, in the discharge of their duties or interfering in any way with the administration or disposition of the affairs and properties constituting the debtor's estate.

(7) Reserving full right and jurisdiction to make from time to time, such orders as to this Court may seem proper, fixing time within which any plan of reorganization may be proposed, accepted, or confirmed, requiring to be filed such schedules and information as may be necessary in this proceeding, the

256 *Petition of Marine Harbor Properties, Inc.*

division of creditors into classes, and in general such order carrying out, amplifying, extending, limiting, or otherwise modifying the order as to this Court may seem just and proper at any time.

(8) Granting such other, further and different relief as to this Court may seem just and equitable in the premises.

Dated: New York, September 15th, 1941.

257 MARINE HARBOR PROPERTIES, INC.

By: .....
President.

FRIEDLAND & FRIEDLAND
Attorneys for Debtor
Office & P. O. Address
291 Broadway
Borough of Manhattan
City of New York.

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STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

GUSSIE HAMMER, being duly sworn, deposes and says: That she is the president of the MARINE HARBOR PROPERTIES, INC. That she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, she believes it to be true.

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GUSSIE HAMMER

Sworn to before me this
15th day of September, 1941.

MIRIAM HARMALIN
Notary Public
Com. exp. Mar. 30/42.

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EXHIBIT "A", ANNEXED TO PETITION OF MARINE HARBOR PROPERTIES, INC.

I, GUSSIE HAMMER, Secretary of MARINE HARBOR PROPERTIES, INC., a New York corporation, DO HEREBY CERTIFY, that I am the Secretary of said Corporation and that at a meeting of the Board of Directors duly convened and held on September 10, 1941, at which meeting a quorum was present, the following resolutions were adopted:

RESOLVED: That this corporation file a petition for re-
263 organization under and in pursuance of Chapter X of the Bankruptcy Act of 1939, as amended; and it is further

RESOLVED: That the proper officers of this corporation be, and they hereby are, authorized and empowered to execute such petitions and other instruments, and to take or cause to be taken such proceedings as may be necessary, or desirable to secure to this corporation any and all relief in pursuant of Chapter X of the Bankruptcy Act of 1939, as amended.

I DO FURTHER CERTIFY that such resolutions are in full force and effect.

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IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the corporation, this 10th day of September, 1941.

GUSSIE HAMMER (L. S.)
Secretary

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Affidavit of Gussie Hammer, Submitted with Debtor's Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

of

266

MARINE HARBOR PROPERTIES, INC.,

Debtor.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

GUSSIE HAMMER, being duly sworn, deposes and says:

I am the president and secretary of the MARINE HARBOR PROPERTIES INC., the above named debtor. This affidavit is 267
presented with a petition for reorganization of the debtor, pursuant to rule X-4 of the Rules of the United States District Court, for the Southern District of New York.

A) There is no action or proceeding in rem pending or threatened against the debtor's property, excepting an action to foreclose the first mortgage. Same is pending in the Supreme Court of the State of New York, and is entitled as follows:

268 *Affidavit of Gussie Hammer, Submitted with Debtor's Petition*

THE MORTGAGE CORPORATION OF NEW YORK, as Trustee under a declaration of trust, dated December 12, 1938, executed pursuant to a plan of readjustment, etc., of the rights of the holders of investments in a certain mortgage covering premises 351 Marine Avenue, Brooklyn, County of Kings, City and State of New York, guaranteed by Bond & Mortgage Guarantee Company, Guarantee No. 181,368, approved by a final order of the
269 Supreme Court of the State of New York for the County of Kings, entered the 6th day of December, 1938, and for the benefit of the holders of investments in said mortgage,

Plaintiff,

against

MARINE HARBOR PROPERTIES, INC., MARINE BUILDING CORPORATION, LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of Bond and Mortgage Guarantee Company, and as successor to Mortgage Commission of the State of New York, MORRIS S. TREMAINE, Comptroller of the State of New York, as
270 successor to and assignee of certain liens of Mortgage Commission of the State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Defendants.

There are no actions or proceedings in personam pending or threatened against the debtor in which a judgment against the debtor or seizure of its property may be imminent, excepting that on June 2, 1941, Seaberg Elevator Co., Inc., perfected and docketed a judgment in the Office of the Clerk of the County of Kings, in the sum of $250.09, which was

Affidavit of Gussie Hammer, Submitted with Debtor's Petition 271

recovered in the Municipal Court of the City of New York, Borough of Brooklyn, First District.

B) 1. That there are no issues of outstanding bond debentures, or other evidences of indebtedness of the debtor, secured by or issued under an indenture or other similar instrument, excepting an extension agreement mentioned in the petition herein.

The original mortgage had been made by debtor's predecessor-in-interest and the debtor has acquired title to its property subject to the aforesaid mortgage. 272

As pointed out in the accompanying petition, the certificates of participation in the first mortgage of $370,000, covering the debtor's property were issued to the general public by Title Guarantee & Trust Co. and guaranteed by the Bond & Mortgage Co., which guaranteed such certificate holders the payment of the principal and interest on said certificates. The certificates of participation were issued against the first mortgage, covering the debtor's property.

Bond & Mortgage Guarantee Co. thereafter became insolvent and a proceeding for the reorganization of the said mortgage under Chapter 745 of the Laws of 1933, as amended, was instituted in the Supreme Court of the State of New York, Kings County. In said proceedings, the Mortgage 273 Corporation of New York was appointed trustee of the said mortgage for the benefit of the certificate holders.

I am informed, and do verily believe that the certificates of participation are held by approximately 90 persons in the United States, both within and without the State of New York. The source of this information is an affidavit of service contained in the records of the Supreme Court of the State of New York, County of Kings.

2. In addition to the foregoing mortgage, certificated as aforesaid, there is a second mortgage covering the property

of the debtor upon which the debtor is also not personally liable. The second mortgagee is the Friedwald Mortgage Corp. of 7321 Fifth Avenue, Brooklyn, New York. It was given by debtor's predecessor-in-interest to secure payment of an original sum of $82,750.00. By agreement with the said mortgagee, made by the debtor, there is presently due on said second mortgage the principal sum of only $25,000.00.

3. In addition to the foregoing mortgages, there is a third mortgage made to Max Olesker and Morris Arenson, in the principal sum of $8,724.07, recorded on November 2, 1938, in the Office of the Register of the County of Kings, in Liber 8286, Page 530 of Mortgages. There is a dispute as to the principal amount now due on said mortgage but same does not exceed the sum of $2,000.00.

4. In addition, there is a fourth mortgage made to Joseph Schwartz, recorded on November 4, 1940, in the Office of the Register of the County of Kings in Liber 6617, Page 6, made to secure payment of the principal amount of $6,480.00. There is a dispute between the debtor and the mortgagee as to the principal amount now due, but same does not exceed $2,000.00.

5. In addition to the foregoing four mortgages, there are various other mortgages still recorded as encumbering the property of the debtor, but all of which have been satisfied and for which satisfaction pieces remain in the possession of the debtor. The satisfaction pieces, for financial reasons, have not been filed and recorded in the Offices of the Register of the County of Kings.

6. That in addition to all of the foregoing, mortgages, there are various conditional bills of sale filed in the Office of the Register of the County of Kings, and encumbering

refrigeration assets, lately installed in the premises of the debtor. In all cases, the conditional vendor is the Kings Appliance Corp. of Brooklyn, New York.

C. The approximate total number of unsecured creditors of the debtor, other than the holders of indebtedness mentioned in subdivision "B" is ten (10), and the name of each creditor, who has a claim against the debtor in excess of 5% of the total of such claim is:

(1) State of New York 278

(2) Friedland & Friedland, Esqs.

There are several other unsecured creditors, whose exact names, addresses, and the amounts due them, are unknown to deponent, because of the fact that the petitioner has been out of possession of the premises and its books for the past several months, since the receiver was appointed, and deponent is unable at the moment, to accurately set forth their exact names, addresses and the amounts due them.

D) The names and addresses of each secured creditor other than the holders of securities specified in subdivision "B)1", the approximate amount of the indebtedness of each, and a brief statement of the nature of the security held by each are as follows: 279

1) Friedwald Mortgage Corp.
8321 Fifth Avenue
Brooklyn, N. Y.

This creditor owns a second mortgage on the property of the debtor. The amount due thereon is $25,000.

2) Max Olesker & Morris Aronson,
570 Seventh Avenue
New York City

280 *Affidavit of Gussie Hammer, Submitted with Debtor's Petition*

This creditor owns a third mortgage on the property of the debtor on which there is a balance due not in excess of $2,000.

3) Joseph Schwartz
570 Seventh Avenue
New York City

This creditor owns a fourth mortgage on the property of the debtor and the amount due thereon is also not in excess
281 of $2,000.00.

B) A brief description of all the property,—in the possession of the debtor, any public officer, receiver, trustee, assignee for the benefit of creditors, mortgages, pledgee, or assignee of rents,—is:

All that part, parcel or piece of land known and described as 351 Marine Avenue, Brooklyn, New York, more particularly set forth in the accompanying petition.

MORTIMER RUBENSTEIN was duly appointed receiver of this property by order of the Supreme Court of the State of New York, County of Kings, in the foreclosure action
282 specified above. He is presently in possession thereof, as such receiver. The property consists of an apartment house, containing approximately 320 rooms, and there has been and still is an annual income in excess of $50,000 from the rental of the aforesaid rooms.

F) A trustee or trustees should be appointed herein by this Court because of the fact that the fixed and liquidated indebtedness encumbering the property of the debtor exceeds in amount $250,000.00. Accordingly, in addition to the trustee to be appointed by this Court, an additional trustee may be appointed herein in accordance with Section 156 of the

Affidavit of Gussie Hammer, Submitted with Debtor's Petition 283

Chandler Act. I ask that such additional trustee, to be appointed, be Samuel Silverman, Esq., of 50 Broad Street, New York City.

Said Samuel Silverman, Esq. has been and still is the vice-president and general counsel of the debtor, is familiar with its affairs, and has had considerable experience in the actual management of real estate. He is an attorney-at-law, duly admitted to practice before this Court, has enjoyed and still enjoys a reputable standing before both the Bench and the Bar. I am certain that he will fulfill each and every qualification imposed by law upon trustees to be appointed in such proceedings. 284

(c) The names of all the officers and directors of the debtor, and their present salaries are as follows:

Name	*Office Held*	*Salary*
Gussie Hammer	President	None
Samuel Silverman	Vice-President	None
Abraham J. Hammer	Treasurer	None
Gussie Hammer	Secretary	None

GUSSIE HAMMER

285

Sworn to before me this
15th day of September, 1941.

MIRIAM HARMALEN
Notary Public, Bronx County
N. Y. Co. Clk's No. 167, Reg. No. 185-H-42
Kings Co. Clk's No. 241, Reg. No. 2321
Commission Expires March 30, 1942

286

Order Dated September 17, 1941, Approving Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause coming on to be heard at this time on the
287 petition of Marine Harbor Properties, Inc., hereinafter called the debtor, verified the 15th day of September, 1941, and the affidavit of Gussie Hammer, Secretary of the debtor, sworn to the 15th day of September, 1941, and the Court having heard the arguments of counsel and being fully advised in the premises,

Upon motion of Friedland & Friedland, Esqs., attorneys for the debtor, it is

FOUND, ORDERED, ADJUDGED AND DECREED:

(1) That the Court is satisfied that the said petition complied with Chapter X of an act entitled "An Act to
288 Establish a Uniform System of Bankruptcy Throughout the United States," approved June 22, 1938, and acts amendatory thereof, hereinafter referred to as the Bankruptcy Act, and that such petition has been filed in good faith.

(2) That said petition be, and it hereby is approved as properly filed under Chapter X of the Bankruptcy Act.

(3) That the debtor is unable to meet its debts as they mature.

(4) That by reason of the facts set forth in said petition, relief under Chapter X is required, and that there is

no adequate remedy save through the granting of such relief.

(5) That Maurice Rubinger, Esq., attorney at law, 160 Broadway, N. Y. C., be, and he hereby is appointed trustee to take possession of the assets of this estate and to continue to act as such trustee until further order of this Court.

(6) That Samuel Silverman, be, and he hereby is appointed additional trustee, pursuant to and in accordance with Section 156 of the Bankruptcy Act.

(7) That Maurice Rubinger and Samuel Silverman, the 290
trustees hereinabove appointed, shall have all of the title to the assets of the debtor, and shall exercise, consistently with the provisions of Chapter X, all of the powers of a trustee appointed pursuant to such chapter, subject, nevertheless, at all times, to the control of this Court and to such limitations, restrictions, terms and conditions as this Court may, from time to time, impose and prescribe, and, without limiting the generality of the foregoing, shall be and hereby are:

(a) authorized to continue in business of all and singular its business, assets, and properties, real, personal and mixed, and of every name and nature, 291
wheresoever situated, and to preserve, manage, operate and use the same, and to carry on its business as an entirety, and to exercise all and singular its rights, authorities, franchises, and privileges, for such manner and to such extent as to it may seem necessary or desirable.

(b) authorized to prosecute, become a party to, intervene in, compromise and defend suits and actions at law, or in equity or otherwise in which it may have any interest as plaintiff, defendant, or otherwise.

292 *Order Dated September 17, 1941, Approving Petition*

(c) authorized to continue the operation of its business as an entirety in usual course and to that end, in its discretion, to employ and discharge, and, subject to the provisions of paragraph "9" (b) hereof, to pay compensation, salaries and wages of such managers, superintendents, bookkeepers, agents and employees, as it may deem necessary or advisable in connection with the custody and control, preservation and operation and management of its estate, or necessary and desirable to avoid detriment thereto; to perform its existing contracts, including leases, to
293 the extent that performance thereof may seem desirable to it; to purchase any merchandise or other personal property required in the regular and usual conduct of its business, and to enter into, perform other contracts in the regular course and conduct of its business, to let and sub-let all or part of the property owned by it, to incur or discharge any and all expenses which it may deem necessary or advisable for any of said purposes or to the end that this business may be continued, operated and managed as an entirety, according to the customary and usual manner of conducting similar businesses, until the further order of
294 this court, in the premises; provided, however, that nothing herein contained shall be deemed affirmance or disaffirmance of any contract or lease of the debtor; that in such affirmance or disaffirmance shall be by virtue of a written notice of an election to affirm or disaffirm by said debtor approved by this court, and not otherwise.

(8) That Mortimer Rubenstein, as receiver of the debtor's property, appointed by the Supreme Court of the State of New York, County of Kings, be, and he hereby is authorized, permitted and directed to surrender, transfer, turn over and

assign all of the assets of the debtor's estate unto the trustees herein, within five days after said nominated trustees shall have duly qualified as such, and a certified copy of this order served upon said Mortimer Rubenstein; and he is further authorized, directed and permitted to account to the said trustees, for all of his acts, conduct and affairs during his term as receiver of the debtor's estate in the Supreme Court of the State of New York, County of Kings, as of the date of such surrender.

(9) That the trustees herein, upon qualification, shall open new books of account as of the opening of business 296
immediately upon qualification and the accounting to them by Mortimer Rubenstein, as receiver, and they shall cause to be kept due and proper accounts of earnings, expense, receipts and disbursements, of the debtor estate hereunder, and the trustees shall preserve proper vouchers for all payments made on account thereof, and shall deposit the monies coming into their hands, in any such banks designated by this Court as depositories of funds of debtor's estate, as shall be selected by such trustees, or in any other bank or banks as may be hereinafter approved by this Court.

(10) That without the further order of this Court, said trustees shall not pledge or create any lien on any of the 297
profits or assets of the debtor, nor shall they pay any salary or other compensation to any of its officers, except as herein provided.

(11) That the said trustees be, and they hereby are authorized in their discretion, from time to time, until further order of this Court, to pay and discharge, out of any funds in or herein coming into their hands, and available for such purposes in the following order:

(a) All expenses and charges incurred in the operation of the business hereby authorized in preserving and maintaining the estate of the debtor.

298 *Order Dated September 17, 1941, Approving Petition*

(b) All claims for accrued wages of employees for services rendered prior to the date of this order but remaining unpaid at the date hereof and entitled to priority in payment under the provisions of the Bankruptcy Act, to the end that the operation of the business of the debtor may not be interfered with or interrupted.

(c) All taxes and charges of the nature thereof lawfully incurred or to be incurred in the operation of the business or imposed upon said property so far
299 as it may deem such payments necessary or advisable in connection with the preservation of its property, and the operation of its business.

(12) That all persons, firms, or corporations, including sheriffs, marshals, or other officers, agents or attorneys, representatives, or employees, whether creditors or claiming to be creditors, or having or claiming to have any right, title or interest in and to the property of the debtor, are hereby enjoined and restrained from interfering with, transferring, selling or disposing of any of the property or income constituting the debtor's estate, and all creditors of the debtor and all other persons, firms, or corporations, are hereby enjoined
300 from commencing or continuing any suit or suits against the debtor until after final decree in these proceedings, and from levying any attachments, executions, or other processes upon or against any of the properties constituting the debtor's estate, or from taking or attempting to take into their possession any part of the property constituting the debtor's estate, and from doing any act whatsoever to interfere with the possession, operation, or management by the trustees of the properties and business constituting its estate, or from interfering in any way with the trustees in the discharge of their duties or interfering in any way in the administration

or disposition of the affairs and property constituting the debtor's estate.

(13) That the proceedings shall be and are hereby referred to P. B. Olney a referee in bankruptcy, as referee, to hear and determine any and all matters not reserved to the Judge by the provisions of Chapter X of the Bankruptcy Act, and Special Master, to hear and report generally upon all matters reserved to the Court by the provisions of Chapter X of the Bankruptcy Act.

(14) That within 15 days after the trustees herein shall 302
have qualified as such, they are hereby authorized, and directed to prepare and file herein a list of the creditors of each class, showing the amounts and character of their claims and securities, and so far as known, the name and the postoffice address or place of business of each creditor; and a further list of the debtors, stockholders, of each class, showing the number and kind of shares registered in the name of each stockholder, and the last known post-office address or place of business of each stockholder.

Sept. 17, 1941.

JOHN BRIGHT
U. S. D. J.

303

Trustees Bond in proper form and to be approved by the undersigned or a judge of this court, fixed at $10,000.

JOHN BRIGHT
U. S. D. J.

304

Stipulation as to Exhibits

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

of

305 MARINE HARBOR PROPERTIES, INC.,
Debtor.

IT IS HEREBY STIPULATED AND AGREED that the following exhibits annexed to the petition of The Mortgage Corporation of New York as Trustee may be eliminated from the printed transcript of record on appeal:

Exhibit B—Notice of proceeding, proposed plan, etc.

306 Exhibit C—Interlocutory order dated July 11, 1938.

Exhibit F—Interlocutory order dated November 17, 1934.

Exhibit G-1—Extension agreement dated March 11, 1935.

Exhibits H and I—Notice of pendency, summons and complaint in foreclosure action.

Stipulation as to Exhibits 307

Exhibit J—Order appointing receiver in New York State Supreme Court, dated May 3, 1941.

Dated, New York, October 14, 1941.

FRIEDLAND & FRIEDLAND,
Attorneys for Debtor-Appellee.

HUGHES, HUBBARD & EWING,
Attorneys for Manufacturers Trust Company, formerly The Mortgage Corporation of New York, as 308
Trustee, Petitioner-Appellant.

MAURICE RUBINGER,
Trustee-Appellee.

SAMUEL SILVERMAN,
Trustee-Appellee.

GEORGE ROSLING,
Attorney for Mortimer Rubenstein, as Receiver-Appellee.

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310

Stipulation as to Record

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record of the said District Court, in the above-entitled action, as agreed upon by the
311 parties hereto.

Dated New York, October 14, 1941.

FRIEDLAND & FRIEDLAND,
Attorneys for Debtor-Appellee.

HUGHES, HUBBARD & EWING,
Attorneys for Manufacturers Trust Company, formerly The Mortgage Corporation of New York, as Trustee, Petitioner-Appellant.

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MAURICE RUBINGER,
Trustee-Appellee.

SAMUEL SILVERMAN,
Trustee-Appellee.

GEORGE ROSLING,
Attorney for Mortimer Rubenstein, as Receiver-Appellee.

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Clerk's Certificate

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled proceeding, as agreed upon by the parties.

314

IN WITNESS WHEREOF, I have caused the seal of the said court to be hereunto affixed at the City of New York, in the Southern District of New York, this day of October, in the year of our Lord One thousand, nine hundred, forty-one and of the independence of the said United States, the One hundred sixty-sixth.

GEORGE J. H. FOLLMER,
Clerk.

315

[fol. 106] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1941

No. 107

(Argued October 20, 1941. Decided January 10, 1942)

In the Matter of MARINE HARBOR PROPERTIES, INC., Debtor-Appellee,

MANUFACTURERS TRUST COMPANY (successor by merger to The Mortgage Corporation of New York), as Trustee for the benefit of certificate holders in mortgage guaranteed by Bond and Mortgage Guarantee Company, Guarantee No. 181,568, Petitioner-Appellant,

MAURICE RUBINGER, Trustee of Marine Harbor Properties, Inc., SAMUEL SILVERMAN, additional Trustee of Marine Harbor Properties, Inc., and MORTIMER RUBENSTEIN, Foreclosure Receiver, Appellees

Appeal from the District Court of the United States for the Southern District of New York

Proceeding by Marine Harbor Properties, Inc., for reorganization under Chapter X of the Bankruptcy Act, 11 [fol. 107] U. S. C. A. § 501 *et seq.* Manufacturers Trust Company as trustee for holders of participation certificates in a first mortgage upon the debtor's real estate appeals from an order denying its application to dismiss the debtor's petition and to vacate a prior *ex parte* order approving the same. Reversed.

Before Swan, Chase and Frank, Circuit Judges

Hughes, Hubbard & Ewing, Attorneys for Appellant; Curtiss E. Frank and Orville H. Schell, Jr., of Counsel.
Friedland & Friedland, Attorneys for Debtor-Appellee.
George Rosling, Attorney for Mortimer Rubenstein, Receiver-Appellee.
Chester T. Lane, General Counsel, and J. Anthony Panuch, Attorney, for Securities and Exchange Commission; George Zolotar and Mortimer Weinbach, of Counsel.

SWAN, *Circuit Judge:*

On September 17, 1941 the debtor obtained an *ex parte* order approving as properly filed under Chapter X of the Bankruptcy Act its petition for reorganization. The Mortgage Corporation of New York, as trustee for mortgage certificate holders, forthwith applied to the district court to vacate its order of approval and to dismiss the debtor's [fol. 108] petition as lacking the good faith required by section 141, 11 U. S. C. A. § 541. After a hearing upon supporting and opposing affidavits, the court denied the application. This order is before us on appeal by Manufacturers Trust Company, the successor by merger of The Mortgage Corporation of New York. The Securities and Exchange Commission filed its appearance in the district court pursuant to section 208, 11 U. S. C. A. § 608, and has presented in this court a brief and argument in support of the order.

So far as relevant to the present controversy section 146 of the Act, 11 U. S. C. A. § 546, provides that

"Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if—

* * * * * * *

(3) it is unreasonable to expect that a plan of reorganization can be effected; or

(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in said prior proceeding."

Each of these clauses, the appellant contends, requires dismissal of the debtor's petition.

The debtor's sole asset is an apartment building in Brooklyn of the value, including the land, of not more than $350,000. The premises are subject to a first mortgage in the principal amount of $370,000, with arrears of interest and taxes which bring the indebtedness secured thereby to approximately $400,000 as of October 1, 1941. There is also a second mortgage for $25,000, a third and fourth mortgage for $2,000 each, a balance of $3,000 due on equipment purchased on conditional bills of sale, and unsecured indebted- [fol. 109] ness in an amount not specified. The first mortgage was made in 1931 by a predecessor in title of the debtor to Title Guarantee & Trust Company, which issued and sold to

the public participation certificates therein guaranteed by Bond & Mortgage Guarantee Company, hereafter called the guarantor. In August 1933 the guarantor was taken over by the Superintendent of Insurance of the State of New York for rehabilitation under the Schackno Act, N. Y. Laws 1933, Ch. 745. In this proceeding a plan of reorganization of the rights of certificate holders in the said first mortgage was approved by the Supreme Court of Kings County on December 6, 1934, with the approval of two-thirds of the certificate holders and with the consent of the debtor. Under this plan the mortgage was extended to December 1, 1937 and interest was reduced from 6% to 5%. Subsequently, by order of December 6, 1938 the state court modified the plan to the extent of appointing The Mortgage Corporation of New York as trustee of the bond and mortgage under an approved form of declaration of trust. This order provided that the court should retain jurisdiction until complete liquidation of the trust estate, and that "the trustee, or any other interested party herein" might apply for other and further relief. After the mortgage matured on December 1, 1937 the debtor continued to pay interest and taxes until April 1, 1941. On that date it defaulted, although the earnings of the property were sufficient to cover interest and taxes. Shortly thereafter foreclosure proceedings were begun and the receiver appointed therein has been in continuous possession of the mortgaged premises since May 6, 1941. The appellant and its predecessor trustee have conducted negotiations with the debtor with regard to a further extension and modification of the mortgage but no agreement was reached and no proposed modification was presented to the certificate holders or to the state court. On [fol. 110] September 17, 1941 the debtor filed in the district court its petition for reorganization under Chapter X of the Bankruptcy Act.

Since the amount owing under the first mortgage is largely in excess of the value of the premises, it is apparent that no equity remains for junior lienors, unsecured creditors or stockholders of the debtor. The appellant, therefore, argues that it is unreasonable to expect that a plan of reorganization can be effected, and that section 146(3) of the Act, 11 U. S. C. A. § 546(3) requires dismissal of the debtor's petition. But as the Supreme Court stated in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 131, approval of a debtor's petition is no indication that its stockholders will participate in the plan. Nor is the fact of insolvency sufficient to prove

that the petition was filed in bad faith. *In re Castle Beach Apartments*, 113 F. 2d 762 (C. C. A. 2); *In re Central Funding Corp.*, 75 F. 2d 256, 261 (C. C. A. 2); *In re Julius Rochrs Co.*, 115 F. 2d 723, 724 (C. C. A. 3). And this is further demonstrated by section 179, 11 U. S. C. A. § 579, where the implication is clear that a plan may be effected, even though the debtor has been found to be insolvent. It is true that when the first mortgage security is inadequate and the debtor has no assets other than the mortgaged premises, it is difficult to conceive of a plan, which the court could approve as fair and equitable, that would give anything to lienors or creditors other than the first mortgage certificate holders, unless new money is put in. But even if it be unreasonable to expect that new money will be forthcoming or that any plan can be effected which will provide anything for the debtor or its shareholders, we do not think clause 3 of section 146, 11 U. S. C. A. § 546(3) requires dismissal of the debtor's petition; the reorganization may still go on in the interest of such creditors as shall be found entitled to share in the debtor's assets. No plan was, or could be, submitted by the debtor with its petition, and we see no error in the district [fol. 111] judge's conclusion that the trustees in reorganization should have an opportunity to explore the possibilities and propose a plan before he should decide that it was unreasonable to expect that any reorganization could be effected. Cf. *In re Blinrig Realty Corp.*, 114 F. 2d 100 (C. C. A. 2).

The second branch of the appellant's argument presents the contention that the pending state court reorganization proceedings require dismissal of the debtor's petition pursuant to section 146(4), 11 U. S. C. A. § 546(4). Primary reliance is placed on the recent decision of this court in *Brooklyn Trust Co.* v. *Rembaugh*, 116 F. 2d 838. In the *Rembaugh* case a finding of good faith was reversed on facts closely parallel to those of the case at bar. There are, however, slight differences which the debtor seizes upon as a ground for distinction. In *Rembaugh*, the plan of reorganization, as promulgated in the state court, provided in the same order for appointment of a trustee and for extension of the mortgage, and the mortgage had not matured when the debtor defaulted and foreclosure was commenced. Therefore, it is urged, the state proceeding was still pending when the debtor's petition was filed, while that is not the situation in the case at bar. With the latter conclusion we cannot agree. It is true that the original plan of re-

organization provided only for an extension of the mortgage to December 1, 1937, but the 1938 proceeding in which a trustee was appointed was denominated a "modification" of the original plan and the court expressly reserved jurisdiction to grant other relief on the application of any "interested party." The debtor had consented in open court to the original plan, had not objected to the modification, and had made payments to the trustee in conformity with it for more than two years. We think the debtor had assented to the modified plan as fully as had the debtor in the *Rembaugh* case. The two cases cannot be distinguished [fol. 112] on this ground. The district court attempted to distinguish them on the ground that "here the debtor has endeavored on two occasions to present modified plans for relief, but on each occasion has been rebuffed by the trustee" and given no opportunity to communicate with the certificate holders. But the debtor made no attempt to bring its proposals to the attention of the state court in the pending proceeding, as we think it was entitled to do as an "interested party"; had it done so its proposals, with the court's approval, could have been presented to the certificate holders. That proceeding provides adequate means to reorganize the mortgage and protect the rights of all certificate holders whose interests alone exhaust the debtor's property. In the *Rembaugh* case we held the element of good faith to be lacking because a debtor, which had voluntarily submitted to a plan for reorganization in the state court but found compliance therewith irksome, invoked federal jurisdiction instead of seeking relief in the state court. Although the debtor did not itself propose a plan, it assented to one proposed by another and was, we said, "in the position of one who voluntarily submitted the plan for the reorganization in the state court"; and the opinion enunciated the following rule: "After electing to have the mortgage provisions modified in the state court proceedings it could not escape from the consequences of the plan to which it had assented by simply filing a petition for reorganization in the federal court while the proceedings in the state court were still pending." Unless we are to overrule the *Rembaugh* case, we think the same decision must be made here.

A majority of the court is of the opinion that the *Rembaugh* case should be given effect here to prevent a debtor, who has assented to a plan which is being supervised by the state court in reorganization proceedings still pending there,

from flouting that jurisdiction by filing a petition in the dis-
[fol. 113] trict court. The applicable principle, as was said in the *Rembaugh* case, is not an absence of good faith in the filing of the new petition in the broad meaning of those words but a special instance of a lack of good faith flowing from the personal disqualification of the debtor. Section 146 (11 U. S. C. A. § 546) expressly disclaims any limitation upon the generality of the meaning of good faith and subsection 4 of that section is but one special instance of what will show a disabling absence of it on the part of a debtor and is not to be confused with what controls here. Nor is it relevant that others than the debtor may have the right to file a petition in the district court regardless of the pendency of a petition in some other court or what the debtor has done there. Until such a petition has been filed, the jurisdiction of the court has been invoked only by the debtor's petition and properly invoked only if the petition has been filed in good faith. Section 141 (11 U. S. C. A. § 541).

Accordingly, the order is reversed.

FRANK, *C. J.*, dissenting:

My colleagues base their decision, requiring dismissal of the petition, on Section 146(4), as they consider it to have been interpreted in the earlier decision of this court in *Brooklyn Trust Co.* v. *Rembaugh*, 110 F. (2d) 838. That decision has been severely criticized. See 18 N. Y. U. L. Q. Rev. (1941) 399, 418; cf. 412-443.

I am wholly in accord with the general policy of adherence to rulings in earlier decisions. But there are well-recognized exceptions to that policy, and I think that the instant case comes squarely within those exceptions. Undeniably, in order to achieve impartial administration of justice, "equality before the law," and legal certainty, as far
[fol. 114] as is practicable,[1] it is important, generally, that a

[1] As to how far it is practicably to procure such certainty through *stare decisis*, see, e.g., Wigmore, *The Judicial Function*, in *The Science of Legal Method*, xxxvi-xxxix; Wigmore, *Problems of Law*, 79-80; Dillon, *The Laws and Jurisprudence of England and America*, 242 ff; Dickinson, *Administrative Justice and The Supremacy of Law*, 210, 231-232; Kessler, *Theoretic Bases of Law*, 9 Un. of Chic. L. Rev. (1941) 98, 107; Green, *Judge and Jury*, 79-80.

court should not deviate, except prospectively,[2] from its own decision in a prior case, even if that decision was in error, especially where such deviation will harm persons who acted in reliance upon that decision—as, for instance, a decision assigning specific legal consequences to specific words in a deed or lease. But that policy loses its force when there has been no such reliance; the question relates solely to procedure; it is plain, on reconsideration in a subsequent case, that the decision in the prior case involved an interpretation of a statute which defeats an important purpose of the legislature, and such interpretation arose from a failure of the court in the prior case to consider matters not called to its attention by the parties.

In *Webster* v. *Fall*, 277 U. S. 507, 511, the court said: "Counsel for appellant directs our attention to other cases, where this court proceeded to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since *in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which* [fol. 115] *merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.* See *New* v. *Oklahoma*, 195 U. S. 252, 256; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 119; *U. S.* v. *More*, 3 Cr. 159, 172; *The Edward*, 1 Wheat. 261, 275-276." Cf. *Massachusetts* v. *Mellon*, 262 U. S. 447, 486. In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the Supreme Court in 1938 over-ruled a statutory interpretation which it had frequently applied over a period of ninety-six years.[3]

[2] As to prospective over-ruling of precedents, see *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 365-366; *People* v. *Maughs*, 149 Cal. 253, 86 Pac. 187; *People* v. *Ryan*, 152 Cal. 364, 92 Pac. 853; cf. Cardozo, *The Nature of the Judicial Process*, 146-149; Wigmore, loc. cit.

[3] See *Burnet* v. *Coronada Oil & Gas Co.*, 285 U. S. 393, 406, note 1, for a list of cases in which the Supreme Court had previously over-ruled its prior decisions. There have been other such cases, since *Erie* v. *Tompkins;* among them are *Nye* v. *United States*, 313 U. S. 33 (1941); *California* v. *Thompson*, 313 U. S. 109, 116 (1941); *Olsen* v. *Nebraska*, 313 U. S. 237 (1941).

In the *Rembaugh* case, briefs were filed by the debtor and by the trustee, appointed in the state court proceeding. No certificate-holder appeared.[4] Indeed, the state court trustee asserted in its brief in that case that it alone could be heard to speak for the certificate-holders.[5] Without at all suggesting any lack of integrity on the part of that state court trustee, it is appropriate to observe that it had a selfish interest, not identical with the interests of the certificate-holders, in having the state court proceeding continue, because the trustee derived emoluments therefrom which would terminate if the Chapter X proceeding was not dismissed.[6] As a result, important considerations affecting [fol. 116] the interests of the certificate-holders were not pressed, and the case was argued as if the major factors were the prior conduct of the debtor (regarded as giving rise to some kind of an estoppel), and the protection of the debtor's interests. Consequently, this court, on the basis of such limited argument, said nothing whatever in its opinion in the *Rembaugh* case as to the purpose and effect of those provisions of Section 146(4) which explicitly refer to the protection of the interests of creditors. Those provisions have, in the instant case, been called to our attention by the S. E. C., which is a party here, as it was not in the *Rembaugh* case. And, as no one who acted in reliance on the decision in that case will be harmed by our failure here to regard it as a binding precedent, we should disregard it, since, if we do not do so, we will, as I shall try to show, be frustrating important objectives of Congress in enacting Chapter X.

Here no "rule of property" is involved. Peculiarly in such a case as this, it is appropriate to bear in mind that "*stare decisis* in statutory contruction, is a useful rule, not an inexorable command,"[7] and that, although it is a doctrine

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[4] As the Chapter X proceeding never went beyond the filing of the petition, presumably no notice was given to certificate-holders.

[5] The trustee went so far as to maintain in its brief that if the Chapter X proceeding continued, it alone, and no certificate-holder, could vote on a plan proposed therein.

[6] A brief, *amicus curiae*, was filed by trustees appointed in other state court proceedings. Of course, they too had such an interest in the continuance of their emoluments.

[7] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 92.

"tending to consistency and uniformity of decision," it "is not inflexible."[8] It has been well said that, although "inconsistent decisions rendered in disregard of the principle of *stare decisis* tend to make the law uncertain and unstable," and a court "may hesitate to disregard a precedent," nevertheless "it is free to do so when convinced that its earlier determination is unsound."[9] "Mere precedent alone is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal."[10] While [fol. 117] uniformity is important, "we must not allow a Blackstonian optimism to blind us to remediable defects * * *. Above all, we must not assign to precedent a sacramental magic in opposition to the principles of logic and justice."[11] It is not the duty of courts, in all circumstances, to perpetuate their errors.

The majority opinion recognizes that it is not at all necessary in order to avoid dismissal of a petition pursuant to Section 146(3), to show that "it is reasonable to expect that a plan of reorganization be effected," in which the debtor or its stockholders will participate. In the instant case, for instance, where, as the majority opinion states, the claims of the certificate-holders exhaust the debtor's property and there is no equity for the stockholders, there is no reason why (unless the stockholders furnish needed new money or other needed new consideration) a plan cannot be effected by which, without the expense or delay involved in foreclosure, the property will promptly be turned over to a new company, having no debts, all of the stock being ratably distributed among the certificate-holders. That some such plan[12] can reasonably be expected to be effected under Chapter X is, we all agree, sufficient to prevent a dismissal pursuant to Clause (3).

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[8] *Hertz* v. *Woodman*, 218 U. S. 205, 212.

[9] *Sears, Roebuck & Co.*, v. *9 Ave.-31 St. Corp.*, 274 N. Y. 388, 400.

[10] *Leavitt* v. *Morrow*, 6 Oh. St. 71, 78.

[11] Allen, *Law in the Making* (1927) 188.

[12] On the all-common-stock plan, see *Matter of Flour Mills of America, Inc.*, 7 S. E. C. 1, 27. In the instant case, such a plan might, in the alternative, provide for a relatively small amount of new debt, and all the debt obligations and stock might be distributed among the certificate-holders.

But the majority opinion, in directing a dismissal under Clause (4), follows the *Rembaugh* case in holding that the controlling factor is the earlier conduct of the debtor in the pending state court proceedings. Such an interpretation of Clause (4) disregards its plain language. By its express [fol. 118] terms, Clause (4) calls for a dismissal of a petition when "a prior proceeding is pending in any court and it appears that the *interests of creditors* and stockholders would be best subserved in said prior proceeding." Clearly, it should be alone sufficient, to prevent dismissal, under (4), that "*the interests of creditors*" will not be best subserved in the prior proceeding. And particularly is that true when, as here, the claims of the creditors exceed the value of the assets, so that there is small likelihood that the stockholders will have any interests.

But in the *Rembaugh* case, the court acted as if Clause (4) provided for dismissal "if it appears that the interests of the stockholders alone will be as well subserved in the prior proceedings; if that appears, then no consideration shall be given to the question whether the interests of the creditors will be best subserved in such proceeding." The majority opinion here, in effect, accepts that interpretation. It says that "*the debtor had assented* to the modified plan as fully as had the debtor in the *Rembaugh* case"; and that "*the debtor made no attempt to bring its proposal to the attention of the state court*"; that "in the *Rembaugh* case we held the element of good faith to be lacking because a *debtor*, which had voluntarily submitted to a plan for reorganization in the state court, but found a compliance therewith irksome, invoked federal jurisdiction instead of *seeking relief in the state court.*"

But why should such conduct of the debtor preclude careful scrutiny by the federal court of what is best for creditors, especially in this case where the majority finds that the interests of the creditors "alone exhaust the debtor's property"? Why, in such a case, should attention be confined solely to the conduct of the debtor and the interests of its stockholders? In any sort of case, the interests of creditors should be given precedence over those of stock- [fol. 119] holders. But in a case like this, it is especially strange to ignore the best interests of the creditors (the certificate-holders) and to order dismissal under Clause (4), either because of some sort of estoppel of the debtor

or because its interest (not that of the creditors) can be as well subserved in the prior proceeding.

The *Rembaugh* interpretation of Clause (4), adopted by the majority here, in effect reads out of the statute the words "the interests of the creditors." And in doing so, it defeats a major purpose of Congress in substituting Chapter X for former Section 77-B. Here we reach the basic error in the *Rembaugh* decision:

The elaborate studies of the S. E. C., and of the congressional committees, which led to the enactment of Chapter X demonstrated that plans had theretofore frequently been adopted in state court proceedings, and even under Section 77-B, which were not "fair and equitable" or which, although "fair and equitable," were not "feasible." For present purposes, it will suffice to consider the way in which the criterion of "feasibility" is applied under Chapter X.

A plan may limit participation to those equitably entitled to participation and provide for distribution of the new securities according to the priorities of such participants in the old enterprise; it is, then, "fair and equitable." But study disclosed that, under many such a plan, there was set up a new enterprise with such an excessive amount of new debt obligations that new defaults soon occurred, compelling a new reorganization in a short time.[13] Such a plan is not [fol. 120] "feasible." Because Congress found that plans lacking feasibility had frequently been adopted but were undesirable, it expressly ruled them out. And one of the principal purposes of Chapter X, in providing for advisory reports by the S. E. C., was to see to it that the district court will be properly informed, before approving a plan

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[13] There are other factors which may render a plan not "feasible." For instance, a plan may call for the issuance of preferred stock with cumulative dividends which cannot be expected to be earned. On feasibility generally (see Note (1941), 18 New York Un. Law Q. Rev. 399, 466. Among the standards applied is the requirement of a capital structure consistent with expected future income [*Matter of San Francisco Bay Toll-Bridge Co.*, 6 S. E. C. 863, 867 (1940); cf. 51 Yale Law J. 86, 91, 96] and of a workable capital structure (S. E. C. Report on Protective and Reorganization Committees, Part VIII, 159-161).

for submission to the old security-holders, as to whether the plan is "feasible." Experience under Chapter X has shown that the district courts, on the basis of such S. E. C. advisory reports, have rejected many plans, or caused them to be modified, because of lack of "feasibility."

Consequently, before dismissing a petition under Section 146(4) because a prior proceeding is pending, the district court, in deciding whether "the interests of the creditors would be best subserved in said prior proceedings," must consider, among other things, whether, in the pending state court proceedings, there are safeguards, at least equivalent to those afforded by Chapter X, to ensure that a plan adopted in the state court proceeding will be not only "fair and equitable" but also "feasible." If the district court finds, for instance, that the value of the property is so small that creditors alone can participate, and that there is only one class of creditors entitled to participation, it must then, before dismissing a petition under Section 146(4), ask and answer this question: Are there safeguards, at least as good as those under Chapter X, to ensure that a plan adopted in the state court—even if it is sure to allocate all the new securities to those creditors—will be so devised as to meet the test of feasibility? It must consider, for instance, whether there are methods, sure to operate in the state court, and as adequate as those under Chapter X, for ascertaining whether it is feasible to issue any new debt-obligations, and, if so, what is feasible as to the principal amount of such obligations and as to the rate of interest.

[fol. 121] It may perhaps be said that such an interpretation of Section 146(4) means that no petition will ever be dismissed thereunder, i.e., that such an interpretation renders Clause (4) functionless. But that is not true. A case can easily arise where, before the Chapter X petition was filed, a plan had been proposed in the pending state court proceedings, and where the district court [14] finds that that state court plan is both "fair and equitable," and "feasible," and that the parties will be protected by safe-

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[14] It would seem appropriate that it obtain an advisory report from the S. E. C. as an aid to making its determination.

guards substantially equivalent to those of Chapter X.[15] In such a case, the petition should be dismissed under Clause (4). If, in the instant case, some such plan had been proposed in the state court before the petition was filed, and the district court could thus have satisfied itself as to the protection of the interests of the certificate-holders, and had done so, then a dismissal would be proper under Clause (4).[16]

But that is not this case. Here the "plan" approved by the state court in December, 1934, as modified in December, [fol. 122] 1938, merely provided for an extension of the mortgage and retention of jurisdiction by the state court until complete liquidation. The debtor subsequently defaulted in payment of interest on April 1, 1941; foreclosure proceedings have been begun in the state court; a state court receiver is in possession; and unsuccessful negotiations for further extension and modification of the mortgage have been conducted. *If, then, there is not to be liquidation, a new plan must be adopted. And no such new plan had been brought forward in the pending state court proceedings, before the petition was filed under Chapter X, nor do we know of any which has, since then, been proposed.*

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[15] One of the important new safeguards of Chapter X is that, in certain kinds of cases, (1) the court must receive an S. E. C. advisory report and must thereafter find the plan fair and equitable and feasible *before* the plan is submitted to those interested in the estate, and (2) those voting on the plan must, *before voting*, have in their hands that advisory report. It may well be, therefore, that, in the supposititious case discussed in the text, not only should the district court, before its dismissal of the petition, find the state court plan fair and equitable and feasible, but should condition its dismissal on the distribution to the creditors, before they vote on the plan of the S. E. C. advisory report. On the public interest in stable investments, see *Matter of San Francisco Toll-Bridge Co.*, 6 S. E. C. 863, 867, 872. On the importance of the judgment of an expert impartial agency as to the issue of valuation, see 51 Yale Law J. 85, 93.

[16] No doubt there might be other situations in which the court might appropriately find that the interests of creditors and stockholders would be best subserved by continuation of the state proceeding.

My colleagues say, and I agree, that the district judge correctly concluded that, so far as Clause (3) is concerned, trustees in reorganization under Chapter X "should have an opportunity to explore the possibilities and propose a plan before he should decide that it was unreasonable to expect that any reorganization could be effected." But my colleagues, out of deference to the *Rembaugh* decision, have decided that, nevertheless, there must be a dismissal under Section 146(4) solely because of the debtor's conduct in the prior and pending proceeding.

True, in so deciding, they say that that prior proceeding "provides adequate means to reorganize the mortgage and protect the rights of all certificate-holders whose interests alone exhaust the debtor's property." But that single reference in their opinion to the protection of the interests of certificate-holders, they support by nothing whatever; there is no demonstration that those interests will be "best subserved" in that ~~proceeding~~, i.e., that there will be safeguards for their interests equivalent to those provided by Chapter X.

Appellant argues that such protection will be afforded in the state court proceedings, and they point particularly to [fol. 123] the function of the Bureau of Trust Supervision in advising the state court as to the fairness of proposed plans. But proof that protection will be provided requires far more than a mere reference to the statute establishing this agency. Absent a more convincing showing, it is impossible for me to concur in a decision dismissing the petition under Section 146(4).

There remains to be considered the suggestion of my colleagues that, quite apart from Clause (4), the conduct of the debtor in the state court demonstrates that the petition was not "filed in good faith," and that such considerations must be regarded because Section 146 begins with the words "Without limiting the generality of the meaning of the term 'good faith' * * *." To such a suggestion, there are, I think, these answers:

My colleagues rest their decision here on the *Rembaugh* case. But in that case this court rejected the argument which my colleagues now advance, saying that there was no "substantial ground for attacking the exercise by the trial judge of discretion to approve the petition as one filed in good faith within the broad meaning of that term." More important is the fact that Congress in Clause (4) explicitly

covered the subject of what effect should be given to "a prior proceeding * * * pending in any court." It said that when there was such a proceeding, then "good faith" was to be tested by the criterion, already discussed, whether the interests of creditors and stockholders would be best subserved therein. To set up other tests of "good faith," concerning such prior proceedings, is, therefore, to enlarge on a subject with which Congress exhaustively dealt in Clause (4). Nothing in the legislative history of the statute justifies such a departure from its language. And the courts should hesitate thus to depart from that language when, as here, to do so means that, realistically considered, the best [fol. 124] interests of creditors—which Congress clearly regarded as of major importance in determining whether a prior proceeding should be the basis of dismissal—will be injured. Anyone familiar with the realities of corporate reorganizations—as Congress was when it enacted Chapter X after the elaborate studies of that subject by the S. E. C. and the Congressional Committees—knows that scattered individual security-holders, such as the individual certificate-holders in this case, are not at all informed as to their rights. It is true that, under Section 126, three such certificate-holders, having claims aggregating at least $5,000, can file a petition for reorganization under Chapter X, notwithstanding the pendency of state court proceedings. But, ignorant of their theoretical rights, as most such security-holders are, they seldom exercise them, but, instead, usually go along with whatever proceedings have already been instituted. It is the well-known inertia of such security-holders which led to the enactment of many of the provisions of Chapter X. Consequently, it is impossible to believe that Congress intended that, once a petition under Chapter X has been filed by a debtor, the federal court should dismiss it, because of the prior conduct of the debtor in a pending state court proceeding, without regard to whether the interests of the creditors will be as well protected in such prior proceeding—merely on the ground that, if the creditors so desire, they later can themselves, independently, file a petition under Chapter X. Under the reasoning of the majority opinion, the present petition, filed by the debtor, will be dismissed without regard to the interests of the certificate-holders, but if, the next day, three certificate-holders, with claims of $5,000, should be alert enough to file a petition, then the district court would be obliged

to refuse a dismissal because then it would be required to consider the best interests of the creditors and to ignore the prior conduct of the debtor in the state court proceedings. [fol. 125] Surely now that a petition has been filed, although filed by the debtor, the same considerations should apply as if creditors had filed it.

The history of the concept of "good faith" has an important bearing on the interpretation of those words in Section 246: (a) That concept had its origin in the reaction to "friendly" equity receiverships, sometimes used by debtors in conjunction with certain of their creditors, to bring about reorganizations often improperly favorable to the debtor or its management at the expense of other creditors. At a period when the reorganization aspects of such receiverships were still considered not the concern of the courts, and when they still confined their attention solely to the formal aspects of the proceedings,[17] such "collusive" methods of initiating the proceedings were condoned.[18] But *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482 (1913) ushered in an era, in which the courts exercise jurisdiction to pass upon the fairness and equity of the reorganization plans which were the true objectives of such receiverships. As a result, there later developed a condemnation of the "friendly" or "collusively" begun receivership and a renewed emphasis on the notion that the receiver must be independent, not a representative of the debtor or any class of creditors, but the eyes and ears of the court. Cf. *Harkin* v. *Brundage*, 276 U. S. 36 (1927); *Shapiro* v. *Wilgus*, 287 U. S. 348 (1932); *Natl. Bk.* v. *Flershem*, 290 U. S. 504 (1933).

The increased awareness that the reorganization was the core of such proceedings, led to the enactment of Section 77-B, which created a judicial procedure fashioned expressly for the purpose of reorganization, recognizing squarely that [fol. 126] the fairness, equity and feasibility of the plan were matters directly for the court's consideration. Unfortunately, however, in one important respect, Section 77-B, marked a retrogression from the equity receivership practice: It permitted the debtor to be continued in possession;

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[17] Cf. Cravath, *Reorganization of Corporations*, in Some Legal Phases of Corporate Financing and Regulation (1917) 153, 190-191; *Conley* v. *International Pump Co.*, 237 Fed. 286, 287 (S. D. N. Y. 1915).

[18] *Re Metropolitan Railway Receivership*, 208 U. S. 90.

and it imposed no standards with respect to the disinterestedness of the trustee, in the event that one was appointed. As a result, in actual practice, in many, if not most, cases, the persons in possession of the property were members of the old management. Moreover, consents to a plan under Section 77-B had to be obtained before the plan could be brought before the court for confirmation. This put pressure on the judge not to undo the efforts expended in procuring such consents—often obtained by the old management or those friendly to it and frequently before the proceedings in court were begun—so as to induce the judge to regard consents given by a large percentage of the creditors as substantial evidence of the fairness of the plan and its feasibility. Not until 1939, after Section 77-B had been repealed, did the Supreme Court, in *Case* v. *Los Angeles Lumber Co., Ltd.*, 308 U. S. 106, 114-115, hold that such a criterion under that Section was improper. Meanwhile, many courts had approved plans (on the assumption that a fair plan was to be merely a sort of bargain)[19] which, measured by the rules later laid down in *Case* v. *Los Angeles Lumber Co., supra*, were unduly beneficial to the debtor and unfair to some of its creditors. While that attitude maintained, the intention and motivations of the persons who instituted Section 77-B proceedings were still of considerable importance—of even greater importance, indeed, than under the more recent equity receivership procedure where, at least, the receiver was sure to be disin-
[fol. 127] terested and where the debtor could not remain in possession, so that the power of the old management to play a role in the formulation of the plan was likely to be less than under Section 77-B. The original concept of "good faith" in the initiation of the proceeding, therefore, justifiably remained dominant under Section 77-B.

The defects in the Section 77-B procedures, above noted, were among the principal reasons for the repeal of that Section and the enactment, as a substitute, in 1938, of the provisions of Chapter X. Those provisions eliminated the possibility of consummating plans improperly devised in the interest of the debtor of any special group of creditors. For, once the court takes jurisdiction under Chapter X, the

[19] E.g. *In re A. C. Hotel Co.*, 93 F. (2d) 841 (C. C. A. 7, 1937); *Downtown Investment Ass'n* v. *Boston Metropolitan Buildings*, 81 F. (2d) 314 (C. C. A. 1, 1936).

proceeding ceases to be under the control of the petitioners or the debtor; it is conducted by a disinterested trustee—who must prepare a plan or report why one cannot be effected—under the constant surveillance by the court, usually assisted by the S. E. C.; and no acceptances of any plan, conditional or unconditional, may, without the consent of the court, be solicited until after the entry of an order approving the plan.

The consequence is that even if a Chapter X petition is filed with an improper intent to bring about a plan lacking in fairness to all the creditors or in feasibility, that improper intent can no longer be realized. Therefore, the existence of such an intent on the part of any petitioner—whether the debtor or anyone else—has become utterly irrelevant under Chapter X. "Good faith" does not have an inflexible meaning regardless of context. The original concept of "good faith," meaningful in the equity receivership and Section 77-B cases, has, accordingly, become meaningless under Chapter X.[19a] To import that concept—designed to prevent [fol. 128] harm to creditors resulting from proceedings begun with an improper or "collusive" purpose—into Chapter X, where such harm is now impossible, so as to compel a dismissal of a Chapter X proceeding solely because of some improper purpose on the part of the debtor or other petitioner, is, paradoxically, to do harm to the creditors through the denial to them of the benefits of a sound and equitable reorganization.[20]

Section 246 must be read in the light of Section 256: The latter section provides that prior proceedings may be superseded regardless of the length of time in which they have been pending. The mere pendency of such prior proceedings, consequently, creates no presumption of any lack of "good faith" in the filing of a Chapter X petition. And, in this connection, we should not ignore this fact: *There is the possibility that, to the detriment of creditors, the prior proceeding "may have been resorted to for the purpose of avoiding the protective devices and stringent standards of Chapter X. It is believed that since the enactment of Chapter X, there has been a substantial increase in the use of state rehabilitation procedures formerly thought to be less desirable and*

[19a] Cf. *Snyder* v. *Fenner*, 101 F. (2d) 736.

[20] Cf. 18 N. Y. U. L. Q. Rev. (1941) 399, 415.

efficient than bankruptcy reorganization procedures."[21] *Such state proceedings, it is suggested,*[21a] *have been utilized, to avoid the safeguards of, and supervision under, Chapter X, just as—until the Supreme Court intervened to stop that practice, in S. E. C. v. U. S. Realty and Improvement Co., 310 U. S. 434,*[22] *Chapter XI proceedings were similarly being employed.*

Let us assume, *arguendo*, that, in the instant case, the state court proceeding was begun and had been acquiesced [fol. 429] in by the debtor for the purpose of avoiding the Chapter X safeguards, but that the debtor, subsequently—but, of course, mistakenly—believing that it would fare better under Chapter X, filed the Chapter X proceeding now before us. There would then be a lack of "good faith," in a colloquial sense, on the part of the debtor. But that bad faith of the debtor in instituting the Chapter X proceeding should surely not operate to take away from the creditors the benefits which they will receive under Chapter X of which, on our assumption, the prior proceeding was designed to deprive them. *Indeed, the more the bad faith of the debtor and those confederating with it in such circumstances, the more reason the bankruptcy court should take jurisdiction.*

There is, then, much merit in the suggestion that such a situation as existed in the *Rembaugh* case and as exists here "would seem to call for the remedies offered by Chapter X," and that "*the interests of the security-holders in a successful and needed rehabilitation should be deemed superior to the possibly questionable motives of the debtor.*"[23]

It should be added that there is no justification for ascribing any unfair motives to the debtor in the instant case. It may have some hopes of supplying new cash so as to permit it or its stockholders to participate in a plan; or it may be desirous of bringing about a plan, fair to its creditors and feasible, in which it will not participate.

For reasons similar to those noted above, it seems plain to me that the doctrine of "election of remedies," intimated in the *Rembaugh* opinion, and by the majority here should

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[21] *Ibid*, 417 and note 161.

[21a] *Ibid.*

[22] Reversing the decision of this court in *In re U. S. Realty and Improvement Co.*, 108 F. (2d) 794.

[23] N. Y. U. L. Q. Rev. *supra*, 418.

be given no weight. That harsh doctrine is fast becoming weaker even in its traditional strongholds,[24] and I cannot [fol. 130] acquiesce in the attempt to import it into the streamlined procedure of the Chandler Act. A Chapter X procedure is not a piece of litigation in which the debtor is one of the contending parties, a lawsuit in which it seeks relief against someone else. As Judge Lindley said of an equity receivership reorganization proceeding, it "is of necessity largely administrative" and requires "the exercise of administrative jurisdiction, as distinguished from decision of controverted or litigated questions."[25] The debtor filing such a petition is not a plaintiff commencing an action; if the court takes jurisdiction, an administrative proceeding ensues in which the estate is administered by an independent trustee under the court's supervision. "Election of remedies" is a doctrine wholly alien to such non-litigious atmosphere.

Even if the doctrine were applicable, I cannot understand why any such election of remedies by the debtor should be determinative of what is for the best interests of the creditors. Again, viewing the situation realistically, it is obvious that the certificate-holders themselves have not, in any real sense, elected in favor of the state court proceeding. They did not select the trustee which now favors the state proceedings, nor can it be realistically said that they have ratified its appointment or actions. The trustee's claim that it can arbitrarily restrict the certificate-holders to the state court proceeding is especially surprising since, so far as appears, the trustee has given them no notice of the present action, and since, in the Chapter X proceeding to which the trustee objects, they will be entitled to notice and a hearing on the appointment of a Chapter X [fol. 131] trustee, 11 U. S. C. A. 561, 562, as well as to vote on a proposed plan, 11 U. S. C. A. 579. And even if it could be said that the certificate-holders had acquiesced in the prior

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[24] See Clark, *Code Pleading* (1928) 335-339; Hinc, *Election of Remedies, a Criticism* (1913) 26 Harv. L. Rev., 707; Comment (1925) 34 Yale L. Rev. 665.

[25] *Lincoln Printing Co.* v. *Middle West Utilities Co.*, 6 Fed. Supp. 663, 682-683; cf. S. E. C., *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees*, Part VIII, 1-2.

proceeding, nevertheless, no theory of election or estoppel should control since, under Clause (4), the inquiry must be what is for their best interests. That cannot be determined by whether or not they acquiesced in the prior proceedings, since Congress indicated no such factor as a test of what is for their best interests.

For the foregoing reasons, we should affirm the order of the district court refusing to dismiss the petition. At most, we should either (a) direct the district court to vacate its order and dismiss the petition, if, and only if, appellant satisfies the district court that some persons interested in the estate have relied to their detriment on the ruling in the *Rembaugh* case;[26] or (b) announce that hereafter, absent proof of such reliance, we shall not adhere to that ruling.[27]

[fol. 132] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of January, one thousand nine hundred and forty-two.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

In the Matter of MARINE HARBOR PROPERTIES, INC., Debtor,

MANUFACTURERS TRUST COMPANY, as Trustee, etc., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

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[26] See authorities cited in footnote 1.

[27] See authorities cited in footnote 2.

[fol. 133] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Marine Harbor Properties, Inc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 27, 1942. D. E. Roberts, Clerk.

[fol. 134] UNITED STATES OF AMERICA,
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 133, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Marine Harbor Properties, Inc., Debtor, Manufacturers Trust Company, as Trustee, etc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-seventh day of January, in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the said United States the one hundred and sixty-sixth.

D. E. Roberts, Clerk. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 16, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.